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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners*,

v.

SUN OIL COMPANY, *Respondent*

Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit
and
Brief in Support Thereof

GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,
NELSON JONES,

Counsel for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No._____

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of the United States:

Humble Oil & Refining Company, Mrs. Sarita K. East, and Mrs. Elena S. Kenedy pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 190 F. 2d 191. The opinion of the Court of Appeals on Petition for Rehearing is reported at 191 F. 2d 705. The opinion of the District Court on the intervention of the State of Texas is reported at 88 FEDERAL SUPPLEMENT 658.

Summary Statement of Matter Involved

The Court of Appeals summarized the matter involved in the following language:

> "On February 24, 1949, this action was instituted in the court below by Sun Oil Company, a New Jersey corporation, against Humble Oil & Refining Company, a Texas corporation, and two individual defendants, both citizens of Texas. Federal jurisdiction was based solely on diversity of citizenship. The suit was to establish title to and recover possession of the oil-and-gas leasehold estate in 26 tracts of land in Kenedy County, Texas; to remove clouds from said title; and to enjoin the defendants from interfering with Sun's use of said property. Sun's claim was that the land in suit was submerged by the waters of Laguna Madre, which was an arm of the sea belonging to the State of Texas; and that said land was leased by the State to Sun.
>
> "The defendants disclaimed title to three of the tracts, on the ground that these three were below mean high tide; as to the remaining tracts, the defendants claimed title under three ancient grants from sovereigns prior to and predecessors of the Republic of Texas. One of these grants, Big Barreta, was issued by the King of Spain; the other, Los Mirasoles and Little Barreta, were from the Mexican State of Tamaulipas; each of these grants called for its eastern boundary to be Laguna Madre. The defendants conceded that the land in controversy was a part of the bed of Laguna Madre when their grants were issued, but claimed that its elevation had been increased so that, when this suit was filed, it was above mean high tide, and was joined to and part of the upland. * * *
>
> "It was admitted by plaintiffs below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown

there by the wind. If the common law were applicable, the call in each grant for Laguna Madre would make the line of mean high tide the eastern boundary of each grant; but, since the common law was adopted in Texas after the grants were issued, the boundary between the sea and the upland must be determined in accordance with the principles announced in Las Siete Partidas, the basic law of Spain and Mexico, which defines the shore of the sea as all the ground 'which is covered with the water of the latter at high tide during the whole year whether in winter or in summer.' The appellants contend that land not covered by the ebb and flow of the tide is not seashore but a part of the upland even though occasionally covered by wind-driven sea water. The appellees contend that land is seashore if it is covered at any time during the year with sea water; and the appellees agree that, regardless of the present situation, at the time of the issuance of these Spanish and Mexican grants to Mirasoles, Little Barreta, and Big Barreta, the Laguna Madre was then a continuous body of water running from Corpus Christi Pass on the north to the Brazos-Santiago Pass on the south, and connected with the Gulf of Mexico at both ends. In their amended answer, the defendants below (appellants here) alleged that the land in controversy was formerly covered by the waters of Laguna Madre, but now lies above the line of not only mean high-tide, but the highest tide in winter, and is accreted land, having accreted to and become a part of the aforesaid grants on which the Humble Oil Company holds valid mineral leases, which it acquired from the owners of said grants." (190 F. 2d 191, 193-194.)

The issue is whether flats which formerly were below sea level and now are above sea level and mean high tide belong to the owners of the adjoining upland or whether they are still a part of the sea. Petitioners own and possess the adjoining upland under grants which call for Laguna Madre

as the eastern boundary. Petitioners claim that said grants include all land above the present tide line and that the flats have built up above the reach of the tide by processes of accretion and reliction. Respondent claims that the flats are submerged land belonging to the State because they are covered at times by sea water blown by the wind from Laguna Madre.

The Conflict With The Balli Case

Attached to this petition is a copy of a contour map which was introduced in evidence (Defendants' Exhibit 20) showing the land in controversy, the upland portions of petitioners' grants, the present location of the bed of Laguna Madre (colored blue), and Padre Island. The elevations shown on this map were admitted by respondent to be correct (R. 361-364). The west boundary line of Padre Island follows the line established in STATE v. BALLI, 144 Tex. 195, (Cert. Den. 328 U.S. 852). The closely analogous BALLI case was a controversy between the State of Texas and various defendants, including respondent, over the title to and boundaries of Padre Island. The Texas Supreme Court held that the Mexican grant conveying Padre Island to respondent's predecessors extended to the line of mean high tide because Laguna Madre was called for as the *west boundary* of the island.

Petitioners say that the principle of Texas law upon which respondent and its co-defendants recovered title to thousands of acres of sand and mud flats in the BALLI case precludes recovery by respondent in the case at bar. This is true because whatever principle of law is applied to determine the boundary between a Mexican grant and the *east side* of Laguna Madre must also be applied to determine the boundary between a Mexican grant and the *west side* of Laguna Madre.

The Texas courts have applied one rule of law to delimit the eastern shore of Laguna Madre, and hopeless confusion will follow if the federal courts apply a different rule of law to delimit the western shore of the same narrow body of water.

The rule of Texas property law applied in the BALLI case is that a call for the sea as a boundary in a Spanish grant, as in a common law grant, extends the grant to the shore as determined by the ebb and flow of the tide, with the result that the boundary shifts with each change in the tide line. The Court of Appeals made no attempt to distinguish the BALLI case or to explain how, on identical facts, it could reach a result opposite to the result reached in the BALLI case on adjoining land. Petitioners say that the decision of the Court of Appeals in the present case cannot be reconciled with the decision of the Texas Supreme Court in the BALLI case and is in conflict with the Balli decision on an important question of Texas land law. The Balli decision is the latest pronouncement by the Texas Supreme Court on this subject.

The Conflict Between the Court's Holding on the Controlling Question and its Decision of the Case

The Court of Appeals held that, since petitioners' grants were issued by Spanish and Mexican governments, the definition of "seashore" contained in *Las Siete Partidas* must control in determining whether the land in suit is "seashore" (190 F. 2d 194). In the trial court and in the Court of Appeals the outcome of this controversy hinged upon the interpretation of this definition, which restricts the shore of the sea to ground "which is covered with the water of the latter at high tide during the whole year, whether in

winter or in summer". Respondent's sole claim to title rested upon its contention that the quoted definition included all land within reach of wind-driven water. If respondent's contention were sustained, then all of the land in suit except parts of Tracts 302, 310 and 311 would be "seashore" because, with these exceptions, it is all covered at times with wind-driven water. On the other hand, petitioners contended that the tide, and not the action of the wind, was controlling, and that, since the land in suit is not affected by the ebb and flow of the tide, it could not be "seashore" under the Spanish law definition. If petitioners' contention were sustained, then the land in suit must be included within petitioners' grants because each of these grants is bounded by the shore of the sea.

The Court of Appeals rejected respondent's contention and accepted petitioners' contention that "seashore" under Spanish law, as at common law, is marked by the ebb and flow of the tide and not by wind-driven water. The Court of Appeals said:

> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind. There are vestiges of hurricane floods for fifty miles or more inland from Beaumont to Brownsville; and the shore of Texas would be cut into fantastic shapes by these overflows if wind-driven waters extended its upland boundary in low places, while the high ground on each side showed no evidence of such overflows. The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons, or other circumstances. Hale, DeJure Maris, Chapter 6; Scott v. Doughty, 124 Va. 358, 97 S.E. 802; Embry's Waters of the State, p. 256. The tide delimits the shore, and it is no respecter of the conflict of laws." (190 F. 2d 195.)

The quoted holding undoubtedly is correct and follows the Texas law. Petitioners say that the decision conflicts with this holding because respondent could not recover on *any theory* unless the land in suit was submerged land at the time of the trial, and the holding precludes the possibility that the land in suit could have been submerged at that time.

The Burden of Proof

Having held that the land in suit is not seashore and, therefore, not submerged land, the Court of Appeals nevertheless affirmed the judgment of the District Court in favor of respondent. The court reached that result from the following conclusions: (1) The burden was on petitioners to prove that the land had accreted to petitioners' grants, (2) petitioners failed to meet that burden, or, in the alternative, (3) the trial court's finding that there has been no substantial building up since the original surveys is not clearly erroneous (190 F. 2d 199).

Petitioners say that it is fundamental that respondent (plaintiff in the trial court) could recover only upon the strength of its own title and not upon the weakness of petitioners' title. Whether this action be regarded as legal or equitable, the holding that the land in controversy is not seashore destroyed respondent's only claim and prevented any recovery by respondent on the strength of its own title. Respondent's title having failed, respondent could not recover even if petitioners had not proved accretion and the findings of the trial court had been correct in every respect.

In the opinion on rehearing the Court of Appeals conceded that respondent could recover only upon the strength of its own title. But the court held that respondent discharged its burden of proof that the land *is* submerged when it proved that the land *was* submerged at the time of the issuance of petitioners' grants. The court said:

> "The burden of proof, therefore, on the issue of accretion was upon the defendants, the plaintiff having shown that, at the time of said grants, the controverted area was submerged land lying beneath the inland waters of the State. A fact, once shown to exist, is presumed to continue until the contrary is proved." (191 F. 2d 715.)

Petitioners say that the contrary was proven beyond any controversy, as shown by the following statement in the first opinion:

> "It was admitted by plaintiffs below that the land in controversy, at the time of the suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown there by the wind." (190 F. 2d 194.)

The contrary was established by respondent's own witness before respondent rested its case in chief (R. 361-364). Petitioners say, also, that the contrary was proven by the undisputed evidence that the land is no longer submerged (R. 1127-1129), by the undisputed evidence that the land has built up above sea level since the grants were issued (R. 1295, 1333-1335), and by the judicial admissions of respondent (R. 1367, 1386-1387).

In the opinion on rehearing the Court of Appeals said also: "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.) At the time of the trial the land in suit admittedly was above the reach of the tide (190 F. 2d 194). The Court of Appeals held that "The tide delimits the shore, and it is no respecter of the conflict of laws." (190 F. 2d 195.) Petitioners say that these holdings demonstrate that the evidence rebutted the presumption upon which the decision rests.

The Trial Court's Finding on Accretion

The Court of Appeals held that the crucial question was whether the land in suit had accreted to petitioners' grants, that the evidence was undisputed, and that "if contrary reasonable inferences may fairly be drawn from the undisputed evidence, then the lower court's finding as to alleged accretions is against appellants; and we cannot say that it is clearly erroneous, the finding being that there has not been any substantial change or building up of the area since the original surveys." (190 F. 2d 199.) The Court of Appeals held that its decision must rest upon this finding (191 F. 2d 716).

Petitioners say that this holding violates the rule that where the facts are not in dispute findings by the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. Petitioners say that the finding in question has no more effect than a conclusion of law by the trial court. Petitioners say also that the finding is clearly erroneous because it is contrary to the undisputed evidence showing that since the date of the grants the land in suit has built up from below sea level to its present elevation by deposition of sand and clay. All of the evidence on this subject was introduced by petitioners and respondents made no effort to controvert it. All of the evidence introduced shows that there has been a building up; no evidence was introduced to show that there has not been a building up.

The Court of Appeals stressed the Coast & Geodetic Survey maps as supporting the trial court's findings. The Court of Appeals said:

> "In practically all of the maps prepared by the United States Geodetic Survey, maps on file in the Texas Land

> Office, and many others in evidence, Padre Island is shown as a long strip of land, colored in the same color as the mainland; *in between, colored in blue, indicating water and connected with the sea at both ends, is an area called Laguna Madre, in which the land in controversy,* as well as the land upon which Humble obtained leases from the State of Texas, *is located.*" * (190 F. 2d 196.)

Plaintiff's Exhibit 84, Coast & Geodetic Survey's Coast Chart No. 1287, is the official map referred to in the opinion. For comparison, we submit herewith, under separate cover, a copy of the latest U. S. Coast & Geodetic Survey map, just off the press, and available only as uncolored "Advance Sheets." These Advance Sheets have been assembled into one map and have been colored according to the official color legend used by the U. S. Coast & Geodetic Survey on all coast charts. (Nautical Chart Manual of U.S.C. & G.S.) This new coast chart, to be printed in 1952, is based on work done in 1949 and 1950. It will be colored like the map submitted, with buff and green colors denoting land features, and the blue color denoting water. This map was not available at the trial or for submission to the Court of Appeals. Petitioners ask this Court to take judicial notice of the new map as the latest official map of the area prepared by the proper department of the Government. KNIGHT v. UNITED LAND ASSOCIATION, 142 U. S. 161, 168.

The new map shows that the land in controversy is no longer in the bed of Laguna Madre, but consisted of sand and mud flats rising above the ebb and flow of the tide in 1950. Coast Chart 1287, referred to in the opinion, is based on a survey made in 1879-1881. Compared with Coast Chart

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NOTE * Emphasis supplied throughout, unless otherwise indicated.

1287, the new map shows that the waters of Laguna Madre have abandoned the land in suit. The new map corroborates the undisputed testimony of Dr. Fisk (R. 1285-1335), which was disregarded by the Court of Appeals. Petitioners say that if the official maps are to have any weight in deciding whether the land *is* submerged, then the most recent map should be considered.

Accretion was Judicially Admitted by Respondent

At the conclusion of the testimony petitioners insisted that all disputed issues of fact should be submitted to the jury. In order to avoid submission of the case to the jury, respondent judicially admitted the fact that the land in suit had been built up from below sea level to its present elevation since the issuance of petitioners' grants (R. 1367, 1386-1387). The case was submitted to the trial court on questions of law presented by undisputed evidence, stipulations and judicial admissions. Three months later the District Judge announced his decision in favor of respondent and the State of Texas, intervenor, and filed voluminous findings of fact. One of these findings was "* * * there has not been any substantial change or building up of the area since the original surveys * * * *" (R. 1842.) When petitioners protested that this finding was contrary to respondent's admissions, the District Judge conceded that respondent had admitted the facts in question, but said that the State had not joined in that admission (R. 1891). The Court of Appeals held that the District Court erred in allowing the State to intervene because diversity of citizenship was thereby destroyed (190 F. 2d 197-198). The Court of Appeals reversed the judgment in so far as the State was concerned, and dismissed the State without prejudice (190 F. 2d 199). Although the State is not and could not be a

party to the suit, the Court of Appeals refused to give any effect to respondent's judicial admissions, on the ground that the State did not join in them. The Court of Appeals said:

> "Although the State's petition to intervene has been denied in this court, we think, in justice to it as an absent party, the admission of Sun's attorney on a mixed question of law and fact, should not be given retroactive effect." (191 F. 2d 714.)

Petitioners say that (1) respondent's admission was on a question of *fact* made for the purpose and with the effect of taking the case from the jury and should, therefore, be enforced, (2) failure of "an absent party" to join in an admission should not invalidate the admission in so far as the actual parties to the suit are concerned, (3) if the State was an indispensable party to the admission, then it is an indispensable party to the suit and the Federal Court could never acquire jurisdiction over the suit, and (4) the State in fact joined respondent in the admissions (R. 1367, 1386-1388).

Petitioners Were Deprived of a Trial by Jury

Because of respondent's admissions, petitioners did not request a jury finding on accretion. Petitioners did request submission of certain other issues to the jury, and further admissions by respondent made fact findings on those issues unnecessary (R. 1824-1825, 1393-1395). All parties had moved for instructed verdict (R. 1816, 1823), but the District Judge did not instruct a verdict. On the ground that the facts were undisputed, he discharged the jury and accepted submission of the case upon questions of law. No question of fact was submitted to the District Judge.

Petitioners say that an admission which is effective to take

a case from the jury should be sufficient to render clearly erroneous a finding by the trial court which conflicts with the admission. If the trial court can take a case from the jury on the ground that all facts are undisputed and then bolster its judgment by findings contrary to the undisputed evidence and the judicial admissions, the constitutional right to jury trial is meaningless. Petitioners say that they have in fact been deprived of a jury trial by the holding of the Court of Appeals.

The Court of Appeals held that the action was in equity and that petitioners were not entitled to a jury trial (190 F. 2d 197). Petitioners say that under Texas law the suit was in trespass to try title, an action at law, in which petitioners were entitled to a jury trial as a matter of right. Petitioners say that the holding conflicts with the applicable local decisions and the decisions of this Court upon an important question of local law, and that this suit is not, and could not be, an equitable proceeding, for the following reasons: (1) Respondent sued to recover title to and possession of land (R. 76), which makes the action one at law under local law, (2) trespass to try title affords an adequate legal remedy and would give respondent any relief to which it would be entitled in an equitable proceeding; (3) respondent did not allege the existence of any instrument of record which could serve as the predicate for an equitable proceeding to remove cloud, and (4) under the principles established at the time of the passage of the Judiciary Act of 1789, equity jurisdiction would not lie because (a) respondent has not established a legal title in a successful action at law, and (b) respondent was not in possession, and ejectment was available because, as a matter of law, petitioners' possession of the upland is also possession of all land formed on the shore by accretion or reliction.

Accretions to Padre Island

The Court of Appeals held that "Most of the land in controversy is on the Padre Island side of the old channel; as to this land, which prior to the construction of said canal was built up by sedimentation across the channel from the mainland appellants claim that it should be considered alluvion added to the shore of the mainland by accretion, but we cannot adopt this view." (190 F. 2d 196.)

The petition for rehearing pointed out that although respondent owns an oil and gas lease on Padre Island, it disclaimed in this suit any land in controversy which has accreted to Padre Island and, therefore, could not recover as to land "built up by sedimentation across the channel." Thereupon the Court of Appeals simply withdrew the above quoted statement, saying that "there is no issue in this case as to any land created by accretion to or reliction from Padre Island." (F. 190 F. 2d 716.) Petitioners say that it is undisputed that a substantial part of the land in suit has accreted to Padre Island and that the Court of Appeals erred in affirming the judgment as to such land after it had been disclaimed by respondent. Petitioners do not claim that this land has been added to their grants by accretion; it built up on the Padre Island side of Laguna Madre and therefore has become a part of Padre Island, which petitioners do not own. Petitioners say that the Court of Appeals committed fundamental error in holding that respondent can recover as to land expressly disclaimed by it.

Jurisdiction

The jurisdiction of this Court is invoked under the JUDICIAL CODE (28 U.S.C. 1254 and 2101 (c). The Court of Appeals denied petition for rehearing on September 20, 1951.

Questions Presented

1.

Did the Court of Appeals follow and apply the Texas law in holding that grants bounded on the East by Laguna Madre do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide?

2.

Did the Court of Appeals follow and apply the Texas law in holding that land formerly in the bed of the sea and now built up above the reach of the tide belongs to the bed of the sea and not to the owner of the adjoining upland, whose grants are bounded by the sea?

3.

Does the holding of the Court of Appeals that respondent should recover because petitioners failed to prove accretion to petitioners' grants violate the fundamental rule that a plaintiff can recover only upon the strength of his own title and not upon the weakness of defendant's title?

4.

Is respondent bound by judicial admissions which it made for the purpose and with the effect of taking the case from the jury?

5.

Did the Court of Appeals follow and apply the Texas law in holding that this action is an equitable proceeding in which petitioners were not entitled to a jury trial as a matter of right?

6.

Should findings of fact be given controlling effect when the record shows that they are contrary to undisputed facts and were made by the trial court after he discharged the jury and accepted submission of the case on questions of law because the facts were undisputed and no findings of fact were necessary?

7.

Did the Court of Appeals err in affirming the judgment for respondent as to land which respondent expressly disclaimed?

Reasons for Allowance of the Writ

1.

The holding that petitioners' grants do not extend to the shore as marked by the ebb and flow of the tide is in conflict with STATE v. BALLI, 144 Texas 195, (Cert. den. 328 U.S. 852). In the BALLI case the Supreme Court of Texas held that a Mexican grant calling for Laguna Madre as the west boundary includes the mud flats lying above mean high tide, although these flats were in the bed of the sea when the grant was made, because "seashore" is restricted by Las Siete Partidas to land lying below mean high tide. Although petitioners' three grants call for Laguna Madre as the east boundary and must be construed according to Las Siete Partidas as interpreted by the Texas courts, the Court of Appeals has held that these grants do not include sand and mud flats lying above mean high tide but are restricted to land which was upland when the grants were issued more than one hundred years ago.

The method of determining boundaries between the sea and privately owned land is of vast importance to every land

owner on the Texas coast, including the State. The Texas courts have settled this question, but if the Federal courts can disregard the Texas decisions, then wherever diversity of citizenship appears, the title to the huge areas of flats along the Texas coast is in doubt. If the decision of the Court of Appeals is sustained, the method of determining boundaries on the coast of Texas will depend upon whether diversity of citizenship exists.

2.

The holding that land formerly in the bed of the sea and now built up above the reach of the tide belongs to the bed of the sea and not to the owner of the adjoining upland is in conflict with STATE v. BALLI, 144 Texas 195, MANRY v. ROBISON, 122 Texas 213, and STATE v. TEXAS LAND AND CATTLE CO. (TCA), 78 S.W. 957, on an important question of local law.

3.

The holding that respondent is entitled to recover on the ground that petitioners failed to prove that the land in suit accreted to their grants is contrary to the fundamental rule of federal law and of local law that a plaintiff can recover only upon the strength of his own title and not upon the weakness of defendant's title. This holding conflicts with the decisions of this court in SHAPLEIGH v. MIER, 299 U.S. 468, 475, DICK v. FORAKER, 155 U.S. 404, 414, and FROST v. SPITLEY, 121 U.S. 552, 557, with the decisions of the Court of Appeals for the Fifth Circuit in GILCREASE OIL CO. v. COSBY, 132 F. 2d 790, 793, and GUARANTEE TRUST & SAFE DEPOSIT CO. v. DELTA & PINE LAND CO., 104 F. 5, 8, and with an unbroken line of decisions of the Texas Supreme Court from DALBY v. BOOTH, 16 Texas 564, 566, to BAUMGARTEN v. FROST, 143 Texas 533, 542.

4.

The holding that respondent discharged its burden to prove its title, i.e. to prove that the land *is* submerged, by proving that the land *was* submerged a century ago, based upon a theory that a fact once shown to exist is presumed to continue, is contrary to the holding and admission that the land in suit is now above the reach of the tide (190 F. 2d 194) and the holding that "The tide delimits the shore and it is no respecter of the conflict of laws." (190 F. 2d 195.)

5.

The holding that respondent is not bound by its judicial admissions, made for the purpose and with the effect of taking the case from the jury, conflicts with the decisions of this court in OSCANYAN v. ARMS CO., 103 U.S. 261, 263, and MUMMA v. POTOMAC CO., 8 Pet. 281, 285. The holding that the trial court was not bound by the stipulated facts but was free to make contrary findings of fact, after discharging the jury on the ground that no findings of fact were necessary, conflicts with the decisions of this court in HACKFELD v. U. S., 197 U.S. 442, 446-447, and MUMMA v. POTOMAC CO., 8 Pet. 281, 285-286.

6.

In giving controlling effect to the trial court's findings of fact, the Court of Appeals has so far sanctioned the departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's jurisdiction. The record plainly demonstrates that no question of fact was submitted to the trial court for his determination. The trial court accepted submission of the case upon questions of law after he discharged the jury

because there was no dispute as to the facts and, therefore, no need for findings of fact. Nevertheless, the trial court found that there had been no substantial building up of the land in controversy. This finding was contrary to the undisputed testimony and to respondent's judicial admissions, which had been made for the purpose and with the effect of taking the case from the jury by eliminating all possible issues of fact. Respondent's admissions and the statements made by the trial court from the bench led petitioners to believe that the fact of accretion, as pleaded and proved by petitioners, was accepted by the trial court and by respondent as an undisputed fact which did not require a jury finding to support it.

7.

The holding that the Court of Appeals is bound by the trial court's findings upon evidence which the Court of Appeals held to be undisputed is in conflict with the decisions of this Court on an important question of federal law. The rule established by the decisions of this Court is that, where the evidence is undisputed, findings of the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. NELSON v. MONTGOMERY WARD & Co., 312 U.S. 373. It is well settled also that a finding which is contrary to the undisputed evidence is clearly erroneous. U. S. v. YELLOW CAB Co., 338 U.S. 338, 342.

8.

The holding that trespass to try title did not afford an adequate remedy at law and that the action was an equitable one in which petitioners were not entitled to a jury trial, conflicts with applicable local decisions on an important question of local law. It is settled Texas law that the statutory action of trespass to try title (Article 7364, REVISED

CIVIL STATUTES OF TEXAS), is a legal remedy broad enough to embrace all character of litigation affecting title to land, and affords a completely adequate legal remedy. THOMPSON v. LOCKE, 66 Texas 383, 388, HARDY v. BEATY, 84 Texas 562, 568. It is well settled, also, that any suit in Texas wherein plaintiff seeks to recover title to and possession of land is in trespass to try title. DAY LAND AND CATTLE CO. v. STATE, 68 TEXAS 526, 535. Respondent sued to recover title to and possession of the land in controversy (R. 76).

If this action had been tried in a State court, it undoubtedly would have been an action in trespass to try title, a suit at law, in which petitioners would have been guaranteed a trial by jury as a matter of right by the Constitutions of the United States and Texas. The sole basis for Federal jurisdiction is diversity of citizenship. If the decision of the Court of Appeals is allowed to stand, the right to a trial by jury in suits involving Texas land will depend upon whether diversity of citizenship exists.

Conclusion

WHEREFORE, petitioners pray that this Court issue a writ of certiorari, directed to the United States Court of Appeals for the Fifth Circuit, and that the judgment of the Court of Appeals and the judgment of the District Court be reversed by this Honorable Court.

HUMBLE OIL & REFINING COMPANY,
MRS. SARITA K. EAST,
MRS. ELENA S. KENEDY,
Petitioners

By GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,

NELSON JONES,
Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The District Court did not write an opinion on the merits; its opinion on the intervention of the State of Texas is reported at 88 Federal Supplement 658. The opinion of the Court of Appeals is reported at 190 F. 2d 191. Its opinion on rehearing is reported at 191 F. 2d 705.

Jurisdiction

The judgment complained of was entered by the Court of Appeals for the Fifth Circuit on June 20, 1951, and petition for rehearing was overruled by that Court on September 20, 1951. The jurisdiction of this Court is invoked under the JUDICIAL CODE (28 U.S.C. 1254 and 2101 (c)).

Statement of the Case and Questions Presented

For a statement of the case and the questions presented, see the foregoing Petition (p. 2, et seq.).

Specification of Errors

1. The Court of Appeals erred in holding, contrary to the Texas decisions, that petitioners' grants do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide.

2. The Court of Appeals erred in holding, contrary to the Texas decisions, that land formerly submerged and now built up above the reach of the tide belongs to the bed of

the sea and not to the owner of the adjoining upland, whose grants are bounded by the sea.

3. The Court of Appeals erred in holding contrary to the applicable federal and local decisions, that respondent (plaintiff) was entitled to judgment because petitioners (defendants) failed to establish their title, even though respondent had failed to establish title in itself.

4. The Court of Appeals erred in holding that respondent is not bound by judicial admissions made by it for the purpose and with the effect of taking the case from the jury.

5. The Court of Appeals erred in holding, contrary to the Texas decisions, that this suit is an equitable proceeding and not a suit in trespass to try title.

6. The Court of Appeals erred in giving controlling effect to findings af fact which are contrary to the undisputed facts, contrary to judicial admissions, and were made by the trial court after discharging the jury because the facts were undisputed and no findings were necessary.

7. The Court of Appeals erred in holding that respondent was entitled to judgment as to land expressly disclaimed by respondent.

8. The Court of Appeals erred in affirming the judgment of the District Court.

Argument

The decision that petitioners' grants do not extend to the shore of Laguna Madre as determined by the ebb and flow of the tide conflicts with the applicable local decisions.

The attached contour map (Defendants' Exhibit 20) shows the tracts in controversy colored orange. The most northerly tracts—273*, 280 and 281—are claimed by petitioners under the grants called Mirasoles and Little Barreta. Each of these grants was issued by the Mexican State of Tamaulipas before Texas independence. The Court of Appeals recognized that "each of these grants called for its eastern boundary to be Laguna Madre". (190 F. 2d 193.)

Petitioners' title to these grants is unquestioned; the Kenedy family and their predecessors in title have owned them for more than a century. Also it is uncontroverted that Mirasoles includes the areas shown on the map as Potrero de las Canales and the northern part of Potrero Farias. In 1879 the State of Texas issued a confirmatory patent on Mirasoles which expressly includes those Potreros (R. 1486-E). Nor is there any question that Little Barreta includes Potrero Lopena and the mounds lying west of it, colored green on the attached contour map, as well as the southern part of Farias. Respondent stipulated that the areas named were included in the original grant to Little Barreta (R. 1393-1394).

Since petitioners own Canales, Farias and Lopena under Mexican grants which call for Laguna Madre as the eastern boundary, Tracts 273, 280 and 281 undoubtedly are included in petitioners' grants because they lie between Canales Farias and Lopena and the shore of Laguna Madre. This is true regardless of whether these tracts have accreted to petitioners' grants. It is true because the call for a natural object—Laguna Madre—cannot be given effect unless these tracts are included in petitioners' grants. The decision of

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* Petitioners disclaimed the part of 273 which is below mean high tide (R. 94). When we refer herein to 273 we mean that part of 273 which was not so disclaimed.

the Court of Appeals violates the cardinal principle of Texas boundary law that a call in a grant for a body of water as a boundary must be given controlling effect in locating the grant. STATE v. BALLI, 144 Texas 195, 251, STOVER v. GILBERT, 112 Texas 429, 436, GALVESTON COUNTY v. TANKERSLEY, 39 Texas 652, 660, PRITCHARD v. BURNSIDE, 140 Texas 212, 219. In OKLAHOMA v. TEXAS, 268 U.S. 252, 255, this Court said:

> "We think it apparent that the survey was intended to call, and did call, for the river as a boundary, and that controlling influence must be given to that call rather than to the course and distance given for that boundary. The courts of Texas, in common with other courts, recognize and apply this rule of interpretation."

It is settled Texas law that the boundary between Laguna Madre and petitioners' grants must be determined by the ebb and flow of the tide. This was the rule laid down in the BALLI case (supra) and recognized as the Texas law by the Court of Appeals when it said:

> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind * * * The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons or other circumstances * * * *The tide delimits the shore and it is no respecter of the conflict of laws* * * * Shore is sometimes said to be synonymous with 'flats' * * *; but *flats are not shore unless the tide ebbs and flows over them* * * * " (190 F. 2d 195.)

The tide does not ebb and flow over Tracts 273, 280 and 281; it is undisputed that the tide is confined within the

zero contour on Defendants' Exhibit 20, running along the eastern boundary of these three tracts. The Court of Appeals said that "It was admitted by plaintiffs below that the land in controversy, at the time of the suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land *only when blown there by the wind.*" (190 F. 2d 194.)

Thus the Texas law requires that (1) Mirasoles and Little Barreta extend to the body of water called for in the grants, and (2) the boundary between the grants and Laguna Madre be determined by the ebb and flow of the tide. To give effect to these rules of Texas law, Tracts 273, 280 and 281 must be included in petitioners' grants. These tracts are not part of Laguna Madre because they are not affected by the tide; they are part of petitioners' grants because they lie west of the natural object which forms the eastern boundary.

The decision of the Court of Appeals is hopelesly in conflict with the decision of the Texas Supreme Court in the BALLI case (supra). The Texas court held in the BALLI case that, as a matter of law, the line of mean high tide is the west boundary line of a Mexican grant calling for Laguna Madre as its west boundary. The principle of law announced by the Texas court in the BALLI case presents an absolute bar to recovery by respondent in the present case. The same principle of law used to determine the boundary between a Mexican grant and the east side of Laguna Madre must also be used to determine the boundary between a Mexican grant and the west side of Laguna Madre. The Texas courts have adopted a rule of law which defines the *eastern* shore of Laguna Madre, and only injustice and confusion can follow if the Federal courts apply a different rule of law in defining the *western* shore of this narrow body of water.

If the decision of the Court of Appeals is affirmed this case will become the first instance in the history of Texas

where a boundary between the upland and a tidal body of water has been held *not* to follow the tide line. No Texas court or officer has ever determined a boundary of a Mexican grant on a theory compatible with the decision of the Court of Appeals.

The laws of Texas impose upon the Commissioner of the General Land Office the duty to establish the boundaries of all State land, including the boundaries between tidal bodies of water owned by the State, and privately owned upland. (Article 5251, REVISED CIVIL STATUTES OF TEXAS)* The Commissioner of the General Land Office, called as a witness by respondent, testified that for forty years it has been the consistent policy of the State of Texas to claim mean high tide as the boundary between tidal bodies of water and Mexican or Spanish grants (R. 1004). The Commissioner testified to numerous specific instances where the Land Office, pursuant to its statutory duty, established the boundary on the ground between state owned submerged land and privately owned Spanish or Mexican grants at the line of mean high tide (R. 1005-1013).

Unless the decision of the Court of Appeals is reversed, the Federal courts will have established a method of determining boundaries in Texas which is contrary to the local decisions and to the long established policy of the State. This means that the rights of property owners on the Texas coast will depend upon whether diversity of citizenship exists between adverse claimants. It was to avoid just such a result that this Court laid down the rule in ERIE R. CO. v. TOMPKINS, 304 U.S. 64, which requires the Federal courts to follow state decisions on matters of local law. It was to avoid "needless conflicts with state policy" that this Court held in ALABAMA PUBLIC SERVICE COMMISSION v. SOUTH-

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*See Appendix, p. 50.

ERN RAILWAY CO., 341 U.S. 341, that the Federal courts should withhold relief and relegate the parties to their remedies in state courts, rather than to determine or shape state policy.

According to Texas law, land formerly submerged and now above the reach of the tide is a part of an adjoining upland grant which is bounded by the sea.

Under the Little Barreta grant petitioners claim Tracts 295, 296, 297, the west 288 acres in 298, the west 97 acres in 299, and the north one-half of each of the following Tracts: 300, 301 and 302. These tracts are in a different situation from 273, 280 and 281 because here Laguna Madre has disappeared completely and the former bed of the sea now is entirely above mean high tide. (See Defendants' Exhibit 20 and the new Coast & Geodetic Survey map submitted herewith.)

The Court of Appeals held that all of the above described land was submerged in 1835 when Little Barreta was titled. The Court said:

> "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.)

The Court said also:

> "The burden of proof, therefore, on the issue of accretion was upon the defendants, the *plaintiff having shown that, at the time of said grants, the controverted area was submerged land* lying beneath the inland waters of the State." (191 F. 2d 715.)

The Court of Appeals held that the above described land admittedly was above the reach of the tide at the time of the trial, 115 years after Little Barreta was titled (190 F. 2d 194). The Court held also that *"The tide delimits the shore, and it is no respecter of the conflict of laws."* (190 F. 2d 195.)

It is apparent that the above described land is not "seashore", as claimed by respondent, under the applicable local decisions (STATE v. BALLI, 144 Texas 195), or under the holding of the Court of Appeals. According to the undisputed evidence and the holding of the Court of Appeals, there is no longer any seashore, or submerged land, or bed of the sea between petitioners' grants and Padre Island from the north line of Tract 298 down to the south line of the most southerly Tract in controversy. Under Texas law when a body of water which separated two riparian Mexican grants recedes from its former bed, the soil left bare becomes the property of the riparian owners. In MANRY v. ROBISON, 122 Texas 213, 227, the Texas Supreme Court said:

> " * * * under the civil law, the State, as the successor in title to the Republic of Mexico to the land involved, *so long as the Brazos river occupied it, held the same under a title within the definition of a base or determinable fee,*—that is, its title, while an estate in fee, was in fact a base or qualified one, *determinable in favor of the riparians upon the abandonment of the bed by the river.*"

Lying above the reach of the tide today, the above described land could not be submerged land under Texas law. It is attached either to Little Barreta or to Padre Island, depending upon whether it is west or east of the last channel occupied by Laguna Madre. It is plain from the admittedly correct contours on Defendants' Exhibit 20 that

the last vestige of the Lagunal trough followed a line running from approximately the northeast corner of Tract 298 to the southwest corner of Tract 299. It is plain from the undisputed testimony of Dr. Fisk (R. 1334-1335) and from Defendants' Exhibit 73, which he introduced to show Laguna Madre as it existed about 1800 (R. 1334), that all of the above described land claimed by petitioners under Little Barreta is on the mainland side of Laguna Madre as it existed when Little Barretta was titled.

Big Barreta lies south of Little Barreta and was titled by the King of Spain in 1804. Petitioners' title to Big Barreta withstood attack by the State in STATE v. SPOHN, which resulted in a judgment decreeing that the eastern boundary of the grant is Laguna Madre (R. 1553-1557). Under Big Barreta petitioners claim the south one-half of Tracts 300, 301 and 302, Tracts 310, 311, 316, 317, 325 and all of Tract 312 except the southeast 81 acres. What has been said concerning land claimed under Little Barreta is applicable also to this land. It certainly is not submerged land under Texas law or under the definition of the Court of Appeals. Since it is not submerged, the judgment is erroneous because respondent's only claim has failed. This would be true even if petitioners had shown no title in themselves. However, under MANRY v. ROBISON, 122 Texas 213; STATE v. BALLI, 144 Texas 195; and STATE v. TEXAS LAND AND CATTLE CO., 78 S.W. 957, this land became attached to Big Barreta when it ceased to be affected by the tide, because the grant calls for Laguna Madre as the boundary.

While petition for rehearing was pending the Court of Appeals propounded certain questions to the parties by telegram. Petitioners' reply contained a copy of Defendants' Exhibit 20 on which was drawn a heavy black line representing the last vestige of the channel of Laguna Madre in the

area where it no longer exists. This line is supported by the undisputed evidence and by Defendants' Exhibits 20 and 73. For the sake of brevity, petitioners refer to that reply for a more detailed discussion.

A large part of the area in controversy lies east of the last channel; petitioners concede that such land is attached to Padre Island and not to petitioners' grants. Petitioners say that the Court of Appeals erred in affirming the judgment as to that land because (1) respondent's sole claim failed when the undisputed proof showed that the land is no longer submerged, and (2) respondent expressly disclaimed as to any land added to Padre Island by accretion or reliction (R. 161, 191 F. 2d 716).

The decision of the Court of Appeals conflicts with the rule that a plaintiff can recover only upon the strength of his own title.

Respondent's only claim to the land in suit is the contention that it is submerged land, a part of the seashore. If it was not proved to be seashore at the time of the trial, then respondent's title failed and respondent could not recover, regardless of any weakness in petitioners' title. Whether this suit is an action in trespass to try title or a bill to remove cloud from title, it is the rule that the plaintiff can recover only upon the strength of his own title and not upon the weakness of the defendants' title. SHAPLEIGH v. MIER, 299 U.S. 468, 475; DICK v. FORAKER, 155 U.S. 404, 414; FROST v. SPITLEY, 121 U.S. 552, 557; GILCREASE OIL CO. v. COSBY, 132 F. 2d 790, 793; GUARANTEE TRUST & SAFE DEPOSIT CO. v. DELTA & PINE LAND CO., 104 F. 5, 8; BAUMGARTEN v. FROST, 143 Texas 533, 542.

This fundamental rule was violated by the decision of the Court of Appeals. That court held correctly that the

land in suit admittedly is above the reach of the tide (190 F. 2d 194), and that the tide delimits the shore and land above its reach is not seashore, even though covered at times with wind driven sea water (190 F. 2d 195). These holdings destroyed respondents' sole claim. Nevertheless, the court affirmed the judgment on the single ground that petitioners failed to establish their defense of accretion or, in the alternative, that the trial court's finding against petitioners was not clearly erroneous (190 F. 2d 199). Thus the Court of Appeals held that defendants' failure to establish their title enabled plaintiff to recover, even though plaintiff's title had failed.

This error was pointed out in petition for rehearing. In the second opinion the Court of Appeals, conceding that respondent must prove the land in suit submerged in order to recover, held that respondent discharged this burden by proving that the land *was* submerged when petitioners' grants were issued. This is the sole basis for the decision on petition for rehearing. Said the Court: "A fact, once shown to exist, is presumed to continue." (191 F. 2d 715.) In so holding, the court disregarded the admitted fact, recited in the first opinion (190 F. 2d 194), that the land in suit is no longer affected by the tide. Likewise it disregarded the fact that respondent's surveyor witness testified, before respondent rested its case in chief, that the land in suit *is* above sea level and that the elevations shown on Defendants' Exhibit 20 *are* correct (R. 361-364). Furthermore, it ignored the trial court's finding that the tides do not *now* ebb and flow over this land (R. 1839). It disregarded also the judicial admissions of respondent (R. 1367, 1386-1387) and the undisputed evidence that the land is no longer submerged (R. 1127-1129).

The presumption upon which the Court of Appeals rested its second opinion was rebutted by admitted facts recited

in the first opinion. Petitioners submit that there is no escape from the proposition that respondent has been allowed to recover, in spite of complete failure of its own title, because of the supposed weakness of defendants' title.

The Court of Appeals erred in holding that respondent is not bound by its judicial admissions.

The evidence relied upon by both sides in the trial court was undisputed. Respondent relied upon undisputed evidence that on occasions most of the land in suit is covered with wind driven sea water. Petitioners relied upon undisputed evidence that the land in suit has, since the date of the grants, built up from below sea level to its present elevation above mean high tide. When the testimony was concluded, the trial court announced that he would submit all disputed issues of fact to the jury. The trial court inquired whether respondent disputed the fact, alleged and proved by petitioners, that this land had built up since the issuance of petitioners' grants. To avoid submission of the case to the jury, counsel for respondent in open court replied that respondent did not dispute that fact or the evidence introduced by petitioners to prove it (R. 1367).

Before the jury was discharged, the trial court repeated his inquiry to counsel for respondent, stating that he did so because the State had not made its position clear. Again, counsel for respondent assured the trial court that respondent did not dispute the fact or the evidence relied upon by petitioners. Respondent's counsel reasserted his admission that the land in controversy was accreted land and that petitioners were entitled to judgment as a matter of law unless his theory of the Spanish law was correct (R. 1386-1387).

When counsel for the State advised the court that " * * * We did not intend to make a fact issue on the fact that the

condition was the same as Mr. de la Fuente found it" (R. 1387), the trial court discharged the jury because there was no disputed issue of fact and no fact findings were necessary, according to the admissions of respondent and the State. In the appendix to this brief (pp. 48-50) we have included quotations from the record showing the colloquies between court and counsel which resulted in the discharge of the jury.

The statements of respondent's counsel, made in open court, constituted a judicial admission of a fact pleaded and proved by petitioners. OSCANYAN v. ARMS CO., 103 U.S. 261, 263; WIGMORE ON EVIDENCE (3d ed.), Sec. 1058. A fact so admitted is established conclusively and cannot thereafter be disputed. OSCANYAN v. ARMS CO. (supra); MUMMA v. POTOMAC CO., 8 Pet. 281, 285; WIGMORE ON EVIDENCE, Sections 2588, 2590. Respondent's admission made it unnecessary for petitioners to request or obtain a finding because the fact was established as a matter of law. HACKFELD v. U. S., 197 U.S. 442, 446-447; BUTE v. STICKNEY (TCA), 160 S.W. 2d 302, 305.

The Court of Appeals refused to give any effect to respondent's admission upon the ground that the State did not consent to the admission (191 F. 2d 713-714). In fact, the State did join respondent in this admission (R. 1386-1388) and the holding is erroneous for that reason. However, the holding would be erroneous even if the State had refused to join, because the Court of Appeals has dismissed the State from this action on the ground that its presence would destroy diversity jurisdiction. The Court of Appeals held correctly that the State is not a citizen and the Federal Courts could never acquire jurisdiction of its claim where jurisdiction depends solely upon diversity (190 F. 2d 197-198). Yet the Court of Appeals has held also that the State's

failure to join in an admission by respondent nullifies the admission. That holding could mean only that the State is an indispensable party to the suit. If so, the Federal Courts could never acquire jurisdiction over this controversy and the cause must be dismissed. POSTAL TELEGRAPH CABLE CO. v. STATE OF ALABAMA, 155 U.S. 482, 487; KENDRICK v. KENDRICK (5 Cir.), 16 F. 2d 744; JOHNSON v. RIVERLAND LEVEE DISTRICT (8 Cir.), 117 Fed. 2d 711, 714. If the holding that respondent is not bound by an admission unless joined therein by the State is correct, then the suit must be dismissed for want of jurisdiction. If this holding is not correct, then the admission of respondent certainly should be enforced, and this would require reversal of the decision of the Court of Appeals.

The statement in the opinion that "The court below disregarded it (the admission) as not having become effective" (191 F. 2d 714), is contrary to the record. The trial court gave effect to the admission when he discharged the jury on the ground that respondent did not controvert the fact relied upon by petitioners. The admission was made by respondent for the purpose and with the effect of avoiding submission of the case to the jury. It is equally clear that petitioners would have requested submission of this issue to the jury if they had not considered respondent's admission effective to dispense with any need for a finding of fact (R. 1394).

The Court of Appeals also stated that the admission was on a "mixed question of law and fact" (191 F. 2d 714), yet the Court of Appeals decided this case upon the sole ground that the question of accretion was one of fact, the burden of proving which was upon petitioners (190 F. 2d 199; 191 F. 2d 715). Since the question whether the land in suit has built up was purely a question of fact, respondent's admission that the land has built up was purely an

admission of fact. This case bears no resemblance to the cases cited by the Court of Appeals (e.g. SWIFT v. HOCKING VALLEY RY. CO., 243 U.S. 281) where parties attempted to agree upon the *law*. This case is one where parties agreed upon a *fact*, as shown by the holding of the Court of Appeals that the burden of proving this *fact* was upon petitioners.

The Court of Appeals erred in giving controlling effect to the trial court's findings on accretion.

Even if the holding that respondent was not bound by its judicial admissions had been correct, the Court of Appeals erred in giving controlling effect to findings which are contrary to the undisputed evidence. The Court of Appeals said: "In the last analyisis, our decision must rest upon these findings, as in our judgment they are not clearly erroneous." (191 F. 2d 716.) The findings upon which the Court of Appeals leaned so heavily were to the effect that there had not been any substantial change or building up since the original surveys (190 F. 2d 199). Petitioners submit that the opinions by the Court of Appeals in this case show that these findings are clearly erroneous.

The Court of Appeals held that respondent proved that "at the time of said grants, the controverted area was submerged land lying beneath the inland waters of the State." (191 F. 2d 715.) The Court of Appeals held that "The area in controversy was formerly the bed of the sea." (191 F. 2d 716.)

To determine whether the Court of Appeals found that the record shows that a substantial building up actually has occurred since the grants, compare the foregoing language with the following:

"It was admitted by plaintiffs below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and that the waters of Laguna Madre encroached upon this land only when blown there by the wind." (190 F. 2d 194.)

"The area in controversy is above sea level, sloping according to the contour from one one-hundredth of a foot above sea level to three or four feet." (190 F. 2d 196.)

"*Most of the land in controversy is on the Padre Island side of the old channel;* as to *this land,* which prior to the construction of said canal *was built up by sedimentation* across the channel * * * " (190 F. 2d 196.)

"It is impossible to determine what has *accreted* to the islands and what to the mainland." (190 F. 2d 197.)

The Court of Appeals held that the evidence was undisputed. The Court said:

"The crucial question for determination is whether land, which admittedly was a part of the original bed of Laguna Madre and outside of appellants' mainland grants, has become a part of the mainland under the doctrine of accretion. The burden of proving this was on appellants; and we think, *upon the undisputed facts,* that they failed to meet this burden. If we are incorrect about this as a conclusion of law, and contrary reasonable inferences may fairly be drawn from the *undisputed evidence,* then the lower court's finding as to the alleged accretions is against appellants; and we cannot say that it is clearly erroneous, the finding being that there has not been any substantial change or building up of the area since the original surveys." (190 F. 2d 199.)

Hence, this is not a case where the trial court made findings of fact upon *conflicting* evidence. The holding that the Court of Appeals was bound by these "findings" conflicts with the decisions of this Court and with prior decisions of that court on an important question of federal law. Where the facts are not in dispute, findings by the trial court are not binding upon the appellate court, which will apply the law of the case to the undisputed facts. NELSON v. MONTGOMERY WARD & Co., 312 U.S. 373, U. S. v. SOUTH GEORGIA RY. Co. (5 Cir.), 107 F. 2d 3, STUBBS v. FULTON NAT. BANK OF ATLANTA (5 Cir.), 146 F. 2d 558. This rule applies to equity suits and to trials without a jury in actions at law. TEXAS AGR. ASS'N v. HIDALGO COUNTY W. C. & IMP. DIST. No. 1 (5 Cir.), 125 F. 2d 829, U. S. v. SOUTH GEORGIA RY Co. (Supra). According to these decisions, a finding by the trial court upon undisputed evidence is of no more effect than a conclusion of law by the trial court.

A finding of fact which is contrary to the undisputed evidence is "clearly erroneous" and must be disregarded. KUHN v. PRINCES LIDA OF THURN & TAXIS (3 Cir.), 119 F. 2d 704, 706, SEARS, ROEBUCK & Co. v. TALGE (8 Cir.), 140 F. 2d 395, 396. It is the duty of the appellate courts, including the Supreme Court, to correct clear error in findings of fact. U. S. v. YELLOW Co., 338 U.S. 338, 342.

If the Court of Appeals had applied the law of the case to the undisputed facts it could not have affirmed the judgment. All of the evidence on accretion and reliction was introduced by petititioners and respondent made no effort to controvert it. The only expert witness was Dr. H. N. Fisk, a geologist whose qualifications are unquestioned (R. 1286-1287). From July, 1947, to January, 1950, Dr. Fisk devoted most of his time to a study of the Laguna Madre flats (R. 1288); he spent months on the flats with a crew

of three geologists and twenty laborers (R. 1295-1296). The accepted method by which geologists determine whether accretion has occurred is the examination of samples obtained from borings (R. 1286-1287). Dr. Fisk examined samples from 3,500 borings made in the area in controversy (R. 1317). Also he studied aerial photographs, topographic maps and other data. The canal was dug across the land in suit during his investigation and Dr. Fisk examined the cut bank as the excavation progressed.

Based upon this intensive investigation, Dr. Fisk gave the following testimony:

(1) The land in controversy once was the bed of an ancient bay and for a long time it has been building up slowly, layer on layer, until today it is above sea level (R. 1295).

(2) This build-up resulted from deposition of wind-blown sand and water-borne clay (R. 1299). These natural processes are still at work, as they have been for hundreds of years. Sand washed up on the Gulf beach of Padre Island dries out there and is blown from Padre Island to the mainland by the prevailing Southeast wind (R. 1305-1306). Irregularities on the surface of the flats disturb the wind currents and cause the sand to drop; for example, a great pile of sand accumulated at an abandoned marsh buggy (R. 1306). The margin of the upland, rising several feet above the surface of the flats, provides the principal irregularity in the area and naturally receives the greatest accumulation of wind blown sand. The same thing is true with respect to water-borne clay; it accumulates at the base or margin of the higher ground against which the wind drives the water (R. 1313).

(3) About 1800 Laguna Madre was a continuous body of water, its bed below sea level, lying between appellants' grants and Padre Island (R. 1335; Defendants' Exhibit 73). The slow addition of layer on layer of wind-blown sand and water-borne clay has caused the flats to rise above sea level (R. 1299).

It is the law in Texas that where a subject is one for experts alone and concerns a matter of science of which a layman can have no knowledge, undisputed expert opinion evidence is conclusive and must be accepted and acted on as other undisputed evidence. COXSON v. ATLANTA LIFE INS. CO., 142 Texas 544, 548, SCOTT v. LIBERTY MUTUAL INS. CO. (TCA), 204 S.W. 2d 16, 18, TRAVELERS INS. CO. v. GLAZIER (TCA), 228 S.W. 2d 217, 220. The rule announced by the Texas courts on this point of local law must be applied by the federal courts in a diversity suit. STONER v. NEW YORK LIFE INS. CO., 311 U.S. 464. The decision of the Court of Appeals, which ignored the undisputed testimony of Dr. Fisk, conflicts with the applicable local decisions on an important question of local law.

Petitioners also introduced other evidence showing accretion and reliction. From the record in STATE v. TEXAS LAND & CATTLE CO., 78 S.W. 957, petitioners introduced the testimony of J. W. Fitch (R. 1362-1363), J. G. Kenedy (1773-1774) and J. B. Wells (1775), all long since deceased. The substance of their testimony, given in 1903, was that the mainland from Corpus Christi to Brownsville had been "extending into the Laguna Madre" year after year as the result of deposition of sand brought from Padre Island by wind and water. Mr. Fitch had been familiar with this condition since 1851, Mr. Kenedy since 1868, and Mr. Wells since 1878. The Texas court held that this testimony was sufficient to prove accretion of a very large area of sand

and mud flats to a Spanish grant, Los Laureles, lying a few miles north of petitioners' grants and calling for Laguna Madre as the eastern boundary (78 S.W. 960-961).

The ancient grants to Mirasoles (R. 1704, Little Barreta (R. 1752) and Padre Island (discussed in detail in 173 S.W. 2d 522), all surveyed by de la Fuente at about the same time, demonstrate conclusively that the condition of the land in suit was far different in the early part of the nineteenth century from the condition which prevailed in 1950. Likewise, the map of the Texas coast prepared by the Texas Navy in 1844 (Defendants' Exhibit 76, R. 1361-1362), shows the depth of the channel between petitioners' grants and Padre Island to be 1½ feet in places where the land was two or three feet above mean high tide in 1950.

To demonstrate the result which would have obtained had the Court of Appeals applied the law of the case to these undisputed facts, we quote from the first opinion:

> "If alluvion forms adjoining the seashore, the latter recedes with the tide; and, by the doctrine of accretion, any new alluvion that forms above the tide line becomes a part of the contiguous upland estate. State v. Balli, supra." (190 F. 2d 196.)

The holding that this suit is an equitable proceeding in which petitioners were not entitled to a jury as a matter of right conflicts with the applicable local decisions.

Article 7364, REVISED CIVIL STATUTES OF TEXAS (enacted in 1840) provides that:

> "All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title."

The oil and gas leasehold estate in Texas is an interest in land. TEXAS CO. v. DAUGHERTY, 107 Texas 226. Trespass to try title is the proper action in Texas to determine a dispute as to ownership of oil and gas in place. YATES v. STATE (TCA), 3 S.W. 2d 114, 118. Respondent (plaintiff) sued to recover "the title to and possession of the leasehold estate in and under the above described tracts of land." (R. 76.) Unquestionably the action would have been regarded as a suit in trespass to try title in the Texas courts. Nor did the accident of diversity of citizenship transform it into an equitable proceeding. The holding of the Court of Appeals that the suit was an equitable action to remove cloud is directly in conflict with WHITEHEAD v. SHATTUCK, 138 U.S. 146, 151.

The Court of Appeals attempted to distinguish WHITEHEAD v. SHATTUCK on the ground that petitioners did not allege that they were in possession. The court said petitioners alleged "only that it was accreted land, above mean high tide, on which they had mineral leases" (191 F. 2d 709). This holding overlooks the fundamental rule that possession of the upland under a grant calling for a body of water as the boundary is likewise possession of accretions. Under the decision of the Texas court in GRAHAM v. KNIGHT (TCA), 240 S.W. 981, 984, petitioners' possession of the upland was possession also of all accretion and reliction attaching to those grants. Petitioners and their predecessors have been in possession of the upland for more than a century (R. 1695, 1696, 1697). Respondent was not in possession; it sought to obtain possession in this suit. Respondent did maintain a camp on Toro, where one employee stayed for a time, but respondent made no claim to possession of any part of the surface except that small area. Respondent made no claim to possession of the oil, gas and mineral leasehold estate

in any of the land in suit,* although that was the estate from which it sought to remove "cloud".

The Court of Appeals held that HOLLAND v. CHALLEN, 110 U.S. 15, is controlling on this point. However, HOLLAND v. CHALLEN is applicable only to a situation where defendant is not in possession and no adequate legal remedy exists. Here trespass to try title afforded an adequate legal remedy. In THOMPSON v. LOCKE, 66 Texas 383, 388, the Texas Supreme Court said:

> "The action of trespass to try title serves the purposes of an action of ejectment in this State; but in it the question of title, as well as the right to possession, is determined and as fully settled as it could be by a suit to quiet title; hence seldom, if ever, could a suit to quiet title, technically considered, be here necessary * * * "

Since respondent sued to recover the title to and possession of the oil and gas leasehold estate, this suit could be regarded only as a trespass to try title action under the Texas law. In HARDY v. BEATY, 84 TEXAS 562, 568, the Texas Supreme Court described the scope of Article 7364 as follows:

> "The remedy was evidently designedly intended as broad enough and effective in its scope to embrace all character of litigation that affected the title to real estate."

Respondent did not allege the existence of any instrument of record which could form the basis for an action to remove cloud. It is elementary that a suit is not one to re-

---

*On the contrary, it alleged it "is now eager to commence drilling operations for the exploration and **discovery** of oil and gas." (R. 74.)

move cloud unless plaintiff alleges and proves the existence of a cloud upon title. DEVINE v. LOS ANGELES, 202 U.S. 313, 335, TRUSTEES OF SCHOOLS v. WILSON, 334 Ill. 347, 78 A. L. R. p. 40. These authorities hold that an assertion of ownership, written or oral, is not a "cloud on title" within equity jurisdiction.

In the case at bar the "cloud" alleged by respondent consisted of three letters written by petitioners to the School Land Board (R. 69-73). These letters asserted that the land in controversy is above mean high tide, has accreted to petitioners grants, and is claimed by petitioners. All three assertions are true and are undisputed by respondent.

The very fact that the "clouds" which respondent seeks to remove are mere letters demonstrates that the real purpose of the suit is not to remove cloud but to recover title and possession. What real relief would respondent obtain from a decree which went no further than to remove three letters from the files of the School Land Board?

The Court of Appeals recognized that the action of trespass to try title is an action at law in which the parties are entitled to a jury trial as a matter of right. In its second opinion, the Court laid down the following test for determining whether petitioners were entitled to a jury trial:

> "Whether or not the parties were entitled to a jury trial in this case as a matter of right depends upon whether the plaintiff had a plain, adequate, and complete remedy at common law to recover these leasehold estates as of the time of the adoption of the Judiciary Act on September 24, 1789, or the Seventh Amendment on December 15, 1791." (191 F. 2d 712-713.)

For the following reasons this action could not be an equitable proceeding when measured by the Court of Appeals' yard stick:

(1) Trespass to try title affords an adequate legal remedy. THOMPSON v. LOCKE, 66 TEXAS 383, 388, TANNILLE v. COPELAND (D. C. Tex.), 288 Fed. 860.

(2) At the time of the adoption of the Judiciary Act or the Seventh Amendment, a court of equity would not entertain a bill to remove cloud unless the complainant already had established a legal title by a successful action at law. STARK v. STARR, 6 Wall. 402; WEHRMANN v. CONKLIN, 155 U.S. 314. Modern statutes in many states permit the suit to be brought in equity, without prior establishment of title in ejectment. Only where such a remedial statute has been enacted can federal courts entertain jurisdiction without prior establishment of title by complainant. WOOD v. PHILLIPS (4 Cir.), 50 F. 2d 714, 716. These statutes do not affect the right to trial by jury, which must be determined in accordance with principles applied by the federal courts when the Judiciary Act of 1789 was adopted. WHITEHEAD v. SHATTUCK, 138 U.S. 146; HENRIETTA MILLS v. RUTHERFORD COUNTY, 281 U.S. 121. Texas did not enact a statute allowing bills to remove cloud to be maintained without prior establishment of legal title in ejectment. Instead Texas created trespass to try title, a *legal* remedy, which is broad enough to embrace all character of litigation affecting title to land. HARDY v. BEATY (supra). Under Texas law respondent could maintain a trespass to try title suit without prior establishment of title and could obtain in that suit all of the relief which could be granted by a court of equity; but the suit would be (as is the present suit) an action at *law*. There is no Texas statute which relieves respondent of the burden of prior establishment of title in an equity suit.

(3) A federal court of equity will not entertain a bill to remove cloud brought against a defendant in possession. WHITEHEAD v. SHATTUCK, 138 U.S. 146, 151.

The Court of Appeals erred in holding that respondent could recover as to land which it had expressly disclaimed.

Since respondent owns an oil and gas lease on Padre Island and its accretions, which it acquired from the owners of the Mexican grant involved in the Balli suit, petitioners requested an admission that respondent did not claim any of the land in suit as accretion to Padre Island. Respondent made this admission, disclaiming any accretion to Padre Island involved in this suit (R. 161. 191 F. 2d 716). The Court of Appeals held in the first opinion that most of the land in controversy had "built up by sedimentation" on the Padre Island side of Laguna Madre and, therefore, could not be accretion to petitioners' grants on the other side of Laguna Madre (190 F. 2d 196). On rehearing, petitioners pointed out that respondent could not recover as to land built up by sedimentation on the Padre Island side because it had expressly disclaimed such land. In the opinion on rehearing the Court of Appeals withdrew the statement contained in the first opinion and said that "there is no issue in this case as to any land created by accretion to or reliction from Padre Island" (190 F. 2d 716).

It is undisputed that the following tracts in controversy are on the Padre Island side of Laguna Madre, as it existed when the grants were made: 314, 327, 339, 340, 355, 356, 369, the East 369 acres of Tract 299, and the East 110 acres of Tract 298.

Petitioners do not claim that their grants include the above numbered tracts. Petitioners recognize that these tracts, lying east of the old channel of Laguna Madre, have

been added to Padre Island by accretion and reliction and, therefore, belong to the owners of Padre Island. Petitioners say that the decision of the Court of Appeals, which allowed respondent to recover as to this land in spite of its express disclaimer, is fundamentally erroneous. HERRING v. SWAIN, 84 Tex. 523; CONVERSE, EXECUTOR v. LANGSHAW, 81 Texas 275, 279; HATTEN v. VOSE (10 Cir.), 156 F. 2d 464, 469. As plaintiff, respondent was required to recover upon the strength of its own title, and it certainly cannot recover as to land which it has expressly disclaimed.

Conclusion

Petitioners therefore pray that this Court grant the writ of certiorari herein prayed for, and that this Court reverse the judgment of the Court of Appeals and that of the District Court.

Respectfully submitted,

GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,

NELSON JONES,
Counsel for Petitioners

APPENDIX

"THE COURT: Of course if you are correct on that, then the question of accretion certainly does not apply to any land that is covered by any water of the sea during the year.

MR. WINN: That is right. That settles the law suit.

MR. JONES: That—excuse me.

THE COURT: But my point is this: I want, while this jury is here, in order that the matter may be fully threshed out, if there be any fact issues, and if you should be wrong about the law and I should agree with you later, I want them to have those findings of fact as a part of the record, whatever they may be, and the issues of accretion and on the issues of—

MR. WINN: Your Honor please, either the Plaintiffs or the Defendants are entitled to a judgment as a matter of law in this case under the record as it now stands.

THE COURT: I am beginning to believe you are right about that.

MR. WINN That is exactly right. Suppose we suggest—

THE COURT: I don't know whether the State will agree or not.

MR. RICE: I don't quite agree with that.

MR. WINN: Suppose you should ask the Jury whether or not the water of the sea goes over this land. There is no dispute about that. Suppose you should ask them if the elevation is above sea level, as has been testified here. No dispute about it. Suppose you should ask them if there has been, as theoretically suggested by Dr. Fisk here, a build-up through a period of years? No dispute about it. We were not bothered about that. The water still rolls over it.

THE COURT: If you are right on the law, that it doesn't make any difference about this theory of accretion, because the water still rolls over it.

MR. WINN: Right. If I am not right, this land is accreted land and the Defendant is entitled to a judgment, as a matter of law. That is exactly where this case stands. That is where we stood when it started, and that is where it stands now." (Rep. Or. Tr. 1724-1726; Sun's Reply 17, 19; R. 1367.)

"MR. JONES: Now, your Honor, it is simply our position that we do not want to be told by an Appellate Court at some future date, whether we are appellants or appellees, that we waived a right to have established the fact question, if one exists, as to the location of Laguna Madre and as to the location of the northeast corner of the Little Barreta. You can see the position we are in on that subject." (R. 1391.)

"THE COURT: Counsel, I want to ask this. I have been giving the matter considerable thought on the possible fact question I see in the case—not covered by any one of these three—and that is,—and I make this statement in view of the argument of the State's attorney yesterday afternoon, that whether or not this area in controversy here is in substantially the same condition it was at the time of de la Fuente's survey—

MR. WINN: We say, if Your Honor please, that that inquiry from the Jury would be of no consequence to you because whether it is or whether it is not, that is taking the evidence in its most favorable light to the defendants, *admitting every word that they have said here,* the uncontroverted evidence is that water still runs over it, and that when water runs over it now, it is still submerged land, and, therefore, it is of no consequence at all as to whether it is in the same condition it was at the time of Fuente as it is now for the reason that it is still submerged land. It wouldn't make any difference if it was five feet high or nine

feet high or if Pike's Peak was out there, as I told you before. If the waters of the sea still roll over it, under the Civil Law it is still a part of the bed of the sea, and that is the sole determining criterion. Therefore, I don't think there is any fact issue about that, or any issue to be submitted to the Jury about it." (R. 1386-1387.)

"THE COURT: Counsel for the State.

MR. RICE: Your Honor, answering your last inquiry first, we did not intend to make a fact issue on the fact that the condition was the same as Mr. de la Fuente found it. The State does have some evidence on that point which we had intended to come in with on rebuttal, and make just such an issue, but in view of the way that the Plaintiffs put on their accretion, the fact that they—all of their accretion either comes from the bed of the sea, or over from Padre Island, and not from the mainland out, we didn't see any use in taking the Court's time in going into the identity of conditions." (R. 1387.)

Article 5251, REVISED CIVIL STATUTES OF TEXAS:

"The Commissioner shall superintend, control and direct the official conduct of all subordinate officers of the General Land Office, and execute and perform all acts and things touching or respecting the public land of this State or rights of individuals in relation thereto, as may be required by law, and make and enforce suitable rules consistent therewith. He shall give information to the Governor and Legislature concerning the public lands, or the General Land Office, when required."

Supreme Court, U. S.
FILED
DEC 17 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

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HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

United States Coast & Geodetic Survey Map Submitted By Petitioners With Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit, And Brief in Support Thereof

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GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,
NELSON JONES,

Counsel for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

JAN 14 1952
CHARLES ELMORE CROP

NO. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

HUMBLE OIL & REFINING COMPANY, ET AL, *Petitioners*

v.

SUN OIL COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CHAS. D. TURNER
FRITZ L. LYNE
J. W. TIMMINS
MARTIN A. ROW
CARLTON R. WINN
Counsel for Respondent.

E. DUNCAN & CO., Brief Printers, 1829 E. Jefferson, Dallas, Texas

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(1) Laguna Madre today is the same as it was when the mainland grants were issued in 1804, 1832 and 1834. Hence the field note calls in the mainland grants to extend eastward to Laguna Madre cannot conflict with it. (Reply to Specification of Error No. 1 of Petitioners.) 16

(2) There can be no accretion to the bed of the sea. (Reply to Petitioners' Specification of Error No. 2.) 25

(3) The respondent Sun proved a title by formal conveyance from the State of Texas, which owns the lands under the inland waters of Laguna Madre. (Reply to Petitioners' Specification of Error No. 3.) 29

(4) The respondent Sun has not made any "judicial admission" with respect to "accertion", and the lower courts were correct in so finding. (Reply to Petitioners' Specification of Error No. 4.) 32

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(5) This Court is not interested in reviewing again the facts which have been concurred in by the two lower courts. (Reply to Petitioners' Specification of Error No. 6.) 38

(6) This is an action in equity to remove cloud and to enjoin petitioners from interfering with respondent's development of oil and gas under its title which it holds from the State of Texas. (Reply to Petitioners' Specification of Error No. 5 and brief thereon, page 41.) 41

(7) Respondent Sun has not filed any disclaimer of its leasehold title under any of the sections, in Laguna Madre. (Reply to Petitioners' Specification of Error No. 7.) 44

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NO. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

HUMBLE OIL & REFINING COMPANY, ET AL, *Petitioners*

v.

SUN OIL COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The official findings of fact and conclusions of law of the District Court, filed under Rule 52(a), in lieu of an opinion, are found in the record.[1] Petitioners moved to

1. R. 1829-68.

strike the Findings;[2] whereupon the District Judge filed an additional "Memorandum on Defendants' Motion to Strike Findings of Fact."[3] The opinion of the Court of Appeals on original submission is reported 190 F.(2d) 191;[4] on motion for rehearing, at 191 F.(2d) 705, to which we particularly direct attention.[5]

QUESTION PRESENTED

Is the land in controversy "submerged", so that it belongs to the State of Texas? The findings of the two lower courts are that "sea water rolls over the entire area throughout the year, irrespective of storms or rainfall."[6] The local law, to be applied, is the civil law of Spain, derived from the Roman law; provides:

> "All that ground is designated the shore of the sea which is covered with the water of the latter during the whole year, whether in winter or in summer."[7]

JURISDICTION

(a) This is no case for certiorari, for the reason that it is only a fact case. The existence of inland sea waters over the land "throughout the year, irrespective of storms

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2. R. 1868-75.

3. R. 1880-94.

4. R. 1932-44.

5. 2181-2206.

6. R. 1840, 1939; 190 F. 2d 197.

7. State v. Balli, 144 T. 195, 251; 190 S. W. 2d 71, 100. R. 1859-63, 1933-7, 190 F. 2d 193-5.

or rainfall," is the controlling fact; found by both lower courts.[6] "There is no grass or plant life of any kind in the entire area, except upon the islands."[6] To the facts must be applied the local law, derived from Spain and the Romans:

> "All that ground is designated the shore of the sea which is covered with the water of the latter during the whole year, whether in winter or in summer."[7]

(b) This is no case for certiorari, for the reason that petitioners "do not assert a grant from any sovereign to this controverted area; but they claim it by accretion * * *. The burden of proving this was on appellants (petitioners); and we think, upon the undisputed facts, that they failed to meet this burden."[8]

(c) This is no case for certiorari, for the reason that the action is purely local. "In fact, land law has always been deemed a matter of local sovereignty." Both lower courts correctly applied the local law as settled by the highest courts of Texas.[9]

(d) This is no case for certiorari, for the reason that the petition presents merely a plea for another review of the case. But the case was reviewed by the trial court for three months, from January 9th to May 18, 1950;

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6. R. 1840, 1939; 190 F. 2d 197.

7. State v. Balli, 144 T. 195, 251; 190 S.W. 2d 71, 100. R. 1859-63, 1933-7, 190 F. 2d 193-5.

8. R. 1942-3, 190 F. 2d 199.

9. R. 1859-67, 1933-41, 2189; 191 F. 2d 713.

reviewed by the Court of Appeals for five months, with two opinions.

(e) The controlling fact which the two lower courts concurred in finding, that "sea water rolls over the entire area throughout the year,"[10] is not in conflict with any other decision, local or national.

(f) This is no case for certiorari, for the reason that the case must be decided upon its own peculiar facts; that is, the concurrent findings of the two lower courts that "there is a regular movement of sea water, repeated many times throughout the year, over all or a part of the lands in controversy,"[11] to which must be applied the applicable civil law:

> "All that ground is designated the shore of the sea which is covered with water of the latter during the whole year, whether in winter or in summer."[12]

(g) This is no case for certiorari, for the reason that it is obvious that the case was correctly decided below by both lower courts, in that they concurred in finding as a fact that "sea water rolls over the entire area throughout the year";[13] to which both courts applied the civil law of Spain, derived from the Romans:

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10. R. 1840, 1939; 190 F. 2d 197.
11. R. 1840, 1940; 190 F. 2d 197.
12. State v. Balli, 144 Tex. 195, 251; 190 S.W. 2d 71, 100.
13. R. 1840, 1939; 190 F. 2d 197.

"By the civil law, the shore extends as far as the highest waves reach in winter."[14]

STATEMENT

We refer the Court to the map which is attached as an appendix to this brief. It is a reduced copy of Plaintiff's Exhibit 3 in the trial court, and will be so referred to throughout this brief.[15]

This map reflects fact findings of the two lower courts in the following particulars:

(a) The Big Barreta, the Little Barreta and the Mirasoles grants on the mainland are on the west side of the map. "The location on the ground of the grants of Big Barreta, Little Barreta and Mirasoles is fixed by the findings of the trial court so that the east lines at no place conflict with the west lines of the state sections in Laguna Madre as located by the State and delineated on a map in the General Land Office * * *."[16] The Big Barreta was granted in 1804 by the Sovereignty of Spain; the Little Barreta in 1834 by the Republic of Mexico, and the Mirasoles in 1832 by the Republic of Mexico. It was during this period that the civil law of Spain, derived from the Roman civil law, was in force in both the Sovereignties of Spain and Mexico.[17] The determination of whether or

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14. R. 1859-63, 1935-6; 190 F. 2d 194-5; Borax Consolidated v. City of Los Angeles, 296 U. S. 10, 22; 56 S. Ct. 23, 80 L. Ed. 9.

15. R. 166-72, 187, 1836.

16. R. 1843-57, 1864-5, 2195; 191 F. 2d 715-6.

17. R. 1843-57, 1859-60, 1934-5; 190 F. 2d 194; R. 2195, 191 F. 2d 715-6.

not the sea has abandoned Laguna Madre must be tested by the rules of the civil law of Spain, derived from the Roman law.[18] The Spanish law is collected in *Las Siete Partidas*, and is *Law IV, Title 28, Third Partidas*, relating to real property.[19]

(b) Laguna Madre is an inland arm of the sea, bounded on the west by the mainland; on the east by Padre Island.[20] The lower courts concurred in finding as a fact:

> "Waters of the Laguna Madre stand throughout the year from Corpus Christi Bay on the North to a point approximately even with the south end of Lopena Island; and from the Brazos-Santiago Pass near Brownsville, on the South, to and including Redfish Bay, at a point less than one mile from Block 369, one of the tracts in controversy here. (Plaintiff's Exhibit 3). *It is from these passes and bays that sea water rolls over the lands in controversy, throughout the year, driven by the prevailing winds.* * * *
>
> "The water is extremely salty. It covers all or a part of the land in controversy (and the lands leased by Humble as well as portions of Padre Island and within Boyles' line) for substantial and appreciable portions of the year. * * *
>
> "* * * *Sea water rolls over the entire area throughout the year, irrespective of storms or rainfall. Movement of this sea water over the entire area is formidable, the pictures resembling general coastal water with considerable waves.*

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18. R. 1859-63, 1933-7, 190 F. 2d 193-5.

19. State v. Balli, 144 Tex. 195, 250; 190 S.W. 2d 71, 100.

20. R. 1834-5, 1837, 1937-8; 190 F. 2d 196.

"* * * *There is a regular movement of seawater repeated many times throughout the year over all or part of the lands in controversy, with regularity*, according to the prevailing winds * * *."[21]

(c) Official maps issued by the State and Federal Governments, from the earliest date to as late as 1941, show Laguna Madre to be an inland arm of the sea, situated between Padre Island on the east and the mainland on the west.[22] Among these are:

(1) The official Land Office Map of Texas for Cameron County for the year 1913;[23]

(2) The same for Kenedy County for the year 1913;[24]

(3) The same for Willacy County for the year 1921;[25]

(4) The official Land Office Map of Texas, styled "Sheet No. 3", issued in September, 1947;[26]

(5) The official map of the United States Coast & Geodetic Survey, No. 1287, fourth edition, issued in July, 1941.[27] On this map Laguna Madre is colored in blue,

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21. R. 1838-9, 1939-40; 190 F. 2d 197.
22. R. 1833-7, 1842, 1938; 190 F. 2d 196.
23. P. Ex. 81, Orig.; R. 422-3.
24. P. Ex. 80, Orig.; R. 420-1.
25. P. Ex. 82, Orig.; R. 423.
26. P. Ex. 624, Orig.; R. 1854.
27. P. Ex. 84, 85, 86, 691, Orig.; R. 433-7, 1038-40.

covering the entire area bounded on the east by Padre Island, on the west by the mainland. It is identified by H. A. Marmer, now connected with the United States Coast & Geodetic Survey.[28]

(6) The official map of the United States Geological Survey, compiled in 1922, which shows Laguna Madre colored in blue, representing water in the entire area bounded on the east by Padre Island and on the west by the mainland, as shown on Plaintiff's Exhibit 3.[29]

(7) The official map of the United States War Department, prepared by Lt. Meade (subsequently Lt. Gen. Meade), who in 1846, for General Taylor's army, prepared a map and report of that portion of Laguna Madre shown on Plaintiff's Exhibit 3.[30]

(Petitioners go entirely out of the record and file here a map which was not introduced in evidence; which this respondent has had no opportunity to cross examine; which on its face shows that it is unofficial, in that it recites, "Subject to correction after verification and review." On the face of this map is a legend: "Water stages in this area vary widely with meteorological conditions. * * * The broken line indicates the approximate inshore limits of areas subject to inundation." Study of the "broken line" reveals that the area colored green is

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28. R. 1038-40.

29. P. Ex. 685, Orig.; R. 960-1.

30. P. Ex. 88-9, Orig.; R. 440-52, 1842, 1943; 190 F. 2d 199.

the same as the area in blue on Plaintiff's Exhibit 3. Furthermore, it is the very fact that "water stages in this area vary widely with meteorological conditions" that the two lower courts concur in finding that "sea water rolls over the entire area throughout the year, irrespective of storms or rainfall. Movement of this sea water over the entire area is formidable, the pictures resembling general coastal water with considerable waves."[31] This variance "with meteorological conditions" is what the Court of Appeals speaks of in its original opinion: "Meteorological influences may be inextricably involved with the rise and fall of the true astronomical tide, but we should distinguish them as meteorological tides."[32] We submit the unsworn, unproved, unofficial "advance print" filed herein by petitioners crucifies, rather than helps, them.

(8) The United States Government to this hour accepts the area colored in blue on Plaintiff's Exhibit 3 to be a part of the inland waters of Laguna Madre. Beginning in 1947 and continuing to 1949, the United States Government dredged a canal, which is shown on Plaintiff's Exhibit 3 traversing the very area in controversy here and marked, "Center Line of Intracoastal Waterway."[33]

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31. R. 1840, 1939; 190 F. 2d 197.

32. R. 1936; 190 F. 2d 195.

33. R. 1937-8; 190 F. 2d 196.

That the inland waters of Laguna Madre are within the boundaries of Texas is found as a fact by both lower courts.[34] See *State v. Sais*, 47 Tex. 307.[35]

September 11, 1947, the School Land Board of Texas, an agency created by the Texas Legislature, offered the sections within Laguna Madre, "as submerged areas", for lease for the purposes of the development of oil and gas. The offer had to be accepted by written bids filed by November 4, 1947.[36] Petitioner Humble accepted the offer; filed written bids on "submerged" land in Laguna Madre, but in the name of an agent, Averill, instead of in its own name. It bid upon practically all the sections colored in blue on Plaintiff's Exhibit 3—those marked "Humble" and those marked "Sun". It was a successful bidder upon those sections marked "Humble". Following is a tabulation showing the sections bid upon by Humble, and the name of the successful bidder on each section which Humble bid upon:

Sections bid upon by Humble	Successful Bidder
276	Humble
280	Sun
281	Sun
283	Pure-Superior

34. R. 1854-7, 1863, 1867, 1896, 1937; 190 F. 2d 196.

35. Also see Kenedy Pasture Co. v. State, 111 Tex. 200, 231 S.W. 683; Article 5415a, Rev. Civ. Stat. of Tex. 1925.

36. P. Ex. 621, R. 973; R. 1854, 1942; 190 F. 2d 198.

Section bid upon by Humble	Successful Bidder
284	Pure-Superior
285	Pure-Superior
286	Coffield
287	Humble
288	Humble
289	Humble
290	Humble
291	Humble
292	Humble
293	Humble
294	Coffield
295	Sun
296	Sun
297	Sun
298	Sun
300	Sun
301	Sun
302	Sun
303	Humble
304	Humble
305	Humble
306	Humble
307	Humble
308	Humble
309	Humble
310	Sun

Section bid upon by Humble	Successful Bidder
311	Sun
312	Sun
313	Humble
314	Sun
315	Humble
316	Sun
317	Sun
318	Humble
319	Humble
320	Humble
321	Humble
322	Humble
323	Humble
324	Humble
326	Humble
327	Sun
328	Humble[37]

But petitioner Humble not only admitted that Laguna Madre was "submerged" by filing its written bids—it backed up its belief by more than a million dollars which it posted to pay for its bids upon "submerged" areas.[38]

Having posted written bids and a million dollars in cash for leases upon "submerged" areas, it turned around, and

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37. R. 1854-7, 1942; 190 F. 2d 198.

38. R. 1855.

at the same time filed with the same state authorities a written letter, dated October 28, 1947, in which it denied that the very land upon which it had bid as "submerged" areas was a part of Laguna Madre.[39]

Is this Court interested in extending its discretion for certiorari to one who has acted in such a way with respect to the identical, same tract of land?

February 3, 1948, the State issued to Sun formal written oil and gas leases on the sections which are involved herein, which are marked "Sun" on Plaintiff's Exhibit 3, cross-hatched, and which are specifically enumerated in Sun's complaint in this cause. For these oil and gas leases, it paid a large sum of money; placed its oil and gas leases of record in Kenedy County, and today is the owner of the leasehold estate of the oil and gas in and under the land described in those leases.[40]

That the petitioner Humble thought that all the sections within Laguna Madre shown on Plaintiff's Exhibit 3 were actually "submerged"; were actually lands beneath the inland waters of Laguna Madre, the property of the State of Texas, is proved, not only by the fact that it posted more than one million dollars in order to procure leases upon said sections, but is further proved by the fact that it was the successful bidder on fifty-six separate sections which are colored in blue on Plaintiff's Exhibit 3 and

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39. R. 1855, 1942; 190 F. 2d 198.

40. R. 990.

marked "Humble"; that it accepted and paid approximately a million dollars for those fifty-six separate leases;[41] placed those fifty-six separate leases of record in the name of its agent, Averill; procured from its agent, Averill, an assignment to "Humble",[42] and has consecutively since February 4, 1948, paid the annual delay rentals required by the terms and provisions of those fifty-six separate leases.[43] Each of the fifty-six leases accepted by petitioner Humble expressly recited that each section is in "Laguna Madre * * * as shown by the official map of Laguna Madre now on file in the General Land Office."[44]

It will be noted by Plaintiff's Exhibit 3 that these leases marked "Humble" border along the east line of the mainland grants as located by the lower courts; border along the west line of Padre Island; are located north and south of the sections which Sun leased.[45]

Sun filed its amended complaint in equity, seeking to remove the clouds that made its property unsalable and useless, by virtue of the written instruments filed by the petitioners in the public records of Texas, not only in the General Land Office, but also with the School Land Board; also seeking a perpetual injunction against petitioners, to restrain them from interfering with its use of the premises

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41. R. 139, 143, 147, 1855.

42. R. 144-5.

43. R. 140-1, 147.

44. R. 1855, 1942; 190 F. 2d 198-9.

45. R. 1855-7, 1866.

for the development and production of oil and gas. Sun alleged that it is in possession.[46] The petitioners in their original answer, under oath, effectually admitted respondent is in possession:

> "Defendant alleges affirmatively that, although defendants have advised plaintiff at all times that defendants own the land described in the complaint, defendants have not prevented plaintiff from making surveys of the land in suit and plaintiff actually has surveyed and staked off on the ground the claimed boundaries of the State leases under which plaintiff brings this suit."[47]

The petitioners in their amended answer also alleged:

> "This defendant alleges affirmatively that the area covered by the tracts of land described in the amended complaint *was formerly covered by the waters of Laguna Madre.*"[48]

The trial court not only entered findings of fact, in which it found that Laguna Madre was still a part of the bed of the sea; that the sea had not abandoned Laguna Madre;[49] but also entered decree that the clouds cast upon the title of respondent be removed; that petitioners be perpetually enjoined from interfering with the use and enjoyment of respondents' oil and gas leases for the devel-

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46. R. 54, 67-8, 1881, 2181; 191 F. 2d 708.

47. R. 53, 54.

48. R. 79, 1933; 190 F. 2d 193.

49. R. 1837-43.

opment for oil and gas.[50] The Court of Appeals expressly approved the findings and decree of the District Court.[51]

I.

THE DECISION BELOW IS CLEARLY CORRECT

(1)

Laguna Madre today is the same as it was when the mainland grants were issued in 1804, 1832 and 1834. Hence the field note calls in the mainland grants to extend eastward to Laguna Madre cannot conflict with it. (Reply to Specification of Error No. 1 of Petitioners.)

Petitioners' specification of error number one does not present any ground for certiorari; does not present any important federal question; on its face presents a matter affected only by local law of Texas.

Petitioners in their answer alleged:

> "This defendant alleges affirmatively that the area covered by the tracts of land described in the amended complaint was formerly covered by the waters of Laguna Madre."[52]

The Court of Appeals adopted the foregoing allegation:

> "The defendants below (appellants here) alleged that the land in controversy was formerly covered by the waters of Laguna Madre."[53]

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50. R. 1895.
51. R. 1938-40, 1942-4, 2195-6; 190 F. 2d 196-7, 199; 191 F. 2d 716.
52. R. 79.
53. R. 1934; 190 F. 2d 194.

In the Big Barreta the field notes call for the west line of Laguna Madre as its east line;[54] in the Little Barreta its field-note calls, and the sketch of the surveyor, Fuente, show Laguna Madre to be its east line;[55] in the Mirasoles the field notes in its original Mexican grant call for its east line to be Laguna Madre[56].

Those calls were made at a time in 1804, 1832 and 1834 when it is admitted by the petitioner that Laguna Madre occupied the same westward position shown in blue on Plaintiff's Exhibit 3—the present position as the two lower courts found it to be.

"From maps, photographs, aerial mosaics and the personal observation of witnesses, what commonly has been regarded as Laguna Madre, until this controversy, *is clearly defined and readily visible.* * * * The edge of the grass line, where it joins the small sandy beaches on all the islands or portreros *and the mainland*, is clear and abrupt. * * * The water is extremely salty. It covers all or a part of the land in controversy for substantial and appreciable portions of the year. * * * There is a regular movement of seawater repeated many times throughout the year over all or part of the lands in controversy, with regularity * * *."[57]

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54. R. 1843-7.

55. R. 1850-1; P. Ex. 5, 6, 64, Orig.; R. 183-4, 318, 1503-4.

56. D. Ex. 7, 8; R. 1136, 1804, 1848.

57. R. 1837-40.

The Court of Appeals expressly approved these findings in its own language:

> "From maps, photographs, aerial mosaics, and the oral testimony of witnesses, the court below found what commonly has been regarded as Laguna Madre, prior to this controversy, *is clearly defined and easily visible.*"[58]

Notwithstanding the mainland grants when issued in 1804, 1832 and 1834 each called for their east lines to stop at Laguna Madre;[59] notwithstanding that to now locate each of those grants by their distance calls in their original and patented field notes, free of conflict with the State Sections in Laguna Madre, gives to the petitioners 20,950.6 acres in excess of the acreage called for in the respective grants;[60] the petitioners nevertheless would now extend those same mainland grants eastward to intersection with Padre Island and take in another and additional 55,000 acres of land.[61] Notwithstanding that the Mexican surveyor, Fuente, who surveyed the Little Barreta and the Mirasoles in 1832 and 1834, respectively, and called for their east lines to stop at Laguna Madre, also surveyed Padre Island in 1829, and called for its west line to be bounded by Laguna Madre;[62] showed by his field-note sketches of his mainland grants of Little Barreta and Mirasoles,[59] as well as his field note sketch of Padre Island,[62]

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58. R. 1938-40; 190 F. 2d 196-7.
59. See Footnotes 54, 55, 56.
60. R. 212.
61. R. 1183-8, 1836; D. Ex. 20, Orig.
62. 144 Tex. 195, 205-6; 190 S. W. 2d 71, 75-6.

that Laguna Madre separated Padre Island from the mainland, the petitioners would extend the mainland grants eastward to intersection with the west line of Padre Island,[61] so that, as the trial court found:

> "This would result in an absolute closure of the East line of the mainland with the West line of Padre Island. Padre Island would no longer be an Island. It would result not only in loss by the State of fifteen to sixteen thousand acres leased to Sun, but over thirty-six thousand acres leased to Humble and approximately four thousand acres leased to others in the immediate area; and an undeterminable amount of land in other areas along the coast West of Padre Island."[63]

Because the Big Barreta, the Little Barreta and the Mirasoles were issued by the Sovereignties of Spain and Mexico; because Padre Island was issued by the Sovereignty of Mexico, the local law of Texas requires that the law of Spain, derived from the Roman civil law, be applied to the fact findings of the two lower courts: "The rule is an elementary one that, in determining the rights of holders of title under Mexican grants, the laws of Mexico in effect when the grants were made control." *Manry v. Robison*, 122 Tex. 213, 221, 56 S.W. (2d) 438, 442.

The latest pronouncement by the Supreme Court of Texas is *State v. Balli*, 144 Tex. 195, 248; 190 S.W. (2d) 71, 99:

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63. R. 1836.

> "It is clear from the decisions of this court that the rights of the state and respondents must be determined in the light of the civil law in effect *at the time of the grant* as it existed in the state of Tamaulipas."

That this civil law must be applied in the instant case is not now contested by the petitioners. But what civil law?

> "The Roman law, including the Institutes of Justinian, was the basis of the Partidas and the laws of Spain and Mexico." *Manry v. Robison*, 122 Tex. 213, 223; 56 S. W. (2d) 438, 442.

In the most recent case of *State v. Balli*, 144 Tex. 195, 248, 190 S.W. (2d) 71, 99:

> "It cannot be doubted that the law as incorporated in Las Siete Partidas was in effect in the State of Tamaulipas at the date of the grant (of Padre Island). In fact, on September 21, 1821, when Mexico gained its independence, the Spanish municipal law was in effect and so continued until the State adopted its first civil code on June 29, 1871."

Therefore, in 1804, when the Sovereignty of Spain issued the title to Big Barreta; in 1829, 1832 and 1834 when the Republic of Mexico issued the grants to Padre Island, Little Barreta and Mirasoles, "the Spanish municipal law was in effect."

The Spanish municipal law, collected into *Las Siete Partidas*, was given an official translation in 1555.[64] The

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64. Gregorio Lopez, Official Translation, first published at Salamanca in 1555. His edition was made official by royal decree of Sept. 7, 1555. See **Bibliography** by John Vance (Law Librarian of Congress), p. 1xx, **Las Siete Partidas**, translated by S. P. Scott for the Comparative Law Bureau of The American Bar Association; Publ. by Commerce Clearing House, 1931.

portions of it dealing with real property were derived exclusively from the Roman law.[65]

The Roman law with which we are concerned is found in the *Institutes of Justinian, Book II, Title 1, Section III,* and in the *Digests* of the Roman law, *Book 50, Title 16, Section 112*:

> "By the civil law, the shore extends as far as the highest waves reach in winter."[66]

The translation of the *Institutes of Justinian, Book II, Title 1, Section III,* by Thomas Cooper, in 1852, is:

Latin	English
"Est autem littus maris, quatenus hybernus fluctus maximus excurrit."	"All that tract of land over which the greatest winter flood extends itself, is the seashore."

In *Angell on Tidewaters, page 68* (2d ed., rev. 1847),[67] the section of the *Institutes of Justinian* is translated:

Latin	English
"Est autem littus maris, quatenus hibernus fluctus maximus excurrit."	"The shore, it is understood, includes the land as far as the greatest wave extends itself in the winter."

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65. **Las Siete Partidas,** Trans. by S. P. Scott; **Introduction** by Charles Sumner Lobingier, p. liv.

66. **Borax Consolidated v. City of Los Angeles,** 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9; R. 1935, 190 F. 2d 195.

67. This authority, **Angell on Tidewaters,** has been expressly cited and approved by the Supreme Court of Texas. **City of Galveston v. Menard,** 23 Tex. 349.

The Court of Appeals in this case has a translation of this section of the *Institutes of Justinian*:

Latin	English
"Est autem littus maris, quatenus hibernus fluctus maximus excurrit."	"However, the shore of the sea in the fourth quarter or winter is where the highest wave extends."[68]

The Court of Appeals in this case also has a translation of the Roman law as it is found in the *Digest, Book 50, Title 16, Section 112*:

> "The public shore extends up to where the highest wave boils up or foams."[69]

It is to be noted that, "The reference is not to waves or sea water in a storm but in an estuary, or exit to the sea, as when the water boils up where the tide meets the current of a river."[69]

It is obvious that the Romans were not concerned with astronomical or lunar tides. The Romans were concerned only with the presence of sea water as their measurement of the bed of the sea. At no place in the Roman civil law is there any reference to or effect given to astronomical tides. It is only in the common law of England that astronomical tides are given effect. Petitioners have tried this litigation all the way on the English common law—not on the civil law.

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68. R. 1935; 190 F. 2d 195.

69. R. 1935-6; 190 F. 2d 195.

When the Spaniards collected the Roman law into *Las Siete Partidas* and included *Law IV, Title 28, Third Partidas*, dealing with the measurement of the bed of the sea, we find these translations:

Gregorio Lopez, Official Translation, 1555:

> "And all that land is designated as the shore of the sea which is covered by the water of the latter in its highest swells, during the whole year, whether in winter or in summer."[70]

The Gregorio Lopez translation from the Latin into English:

> "But only that part of the land covered by the highest swells in perennial agitation during the winter, as well as during the strong but customary summer storms."[71]

Lislet & Carleton, 1820:

> "And by the seashore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer."[72]

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70. See Footnote 64.

71. Lopez Glossary, Recognized as the authoritative interpretation of Las Siete Partidas; Spanish Translation Publ. Barcelona, 1843-4 (See Vance, **Bibliography, Scott's Partidas**, p. lxxxii.).

72. **The Laws of Las Siete Partidas**, which are still in force in the State of Louisiana, translated from the Spanish by L. Moreau Lislet and Henry Carleton; printed by James M'Karaher, New Orleans, 1820. (See Vance's, **Bibliography, Las Siete Partidas**, trans. by S. P. Scott, p. xciv.).

Joseph M. White's Translation, 1839:

> "By the shore of the sea we understand whatever part of it is covered with water, whether in winter or summer."[73]

The *Joseph M. White Translation of 1839* has been expressly adopted by the Supreme Court of Texas in *State v. Balli*, 144 Tex. 195, 250, 251, 190 S.W. (2d) 71, 100:

> " 'By the shore of the sea we understand whatever part of it is covered with WATER, whether in winter or summer.' * * * (1 White's Recopilacion, p. 70)
>
> "Thus the seashore was no part of the land, but always an adjunct of the sea. * * * The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with WATER of the latter during the whole year, whether in winter or in summer.' "

It is to be noted that the Spaniards were not concerned with astronomical tides. They were concerned, precisely as the Romans were concerned, with nothing but sea water; the extent to which the waves of the sea rolled in normal times.

The two lower courts in this case applied the foregoing civil law of the Romans and of the Spaniards, as collected by the latter in *Law IV, Title 28, Third Partidas;* concluded, both from the facts and from the applicable local

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73. "White's **Recopilacion**", "A new Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain, Relating to the Concessions of Land in their Respective Colonies; Together with the Laws of Mexico and Texas on the Same Subject. To which is Prefixed Judge Johnson's Institutes of the Civil Law of Spain"; T. & J. W. Johnson, Law Booksellers, Philadelphia, 1839.

law, that Laguna Madre covered the area that is colored in blue on Plaintiff's Exhibit 3; exactly the same area that was covered in 1804, 1832 and 1834, when the grants were issued on the mainland; in 1829, when the grant was issued to Padre Island.[74]

Is this Court interested in again reviewing the same facts and local law?

(2)

There can be no accretion to the bed of the sea. (Reply to Petitioners' Specification of Error No. 2.)

Petitioners' specification of error number two presents nothing but a matter of fact which has been resolved adversely to petitioners by the concurrent findings of both lower courts; presents no federal question whatever; presents only a matter of application of the local law to the facts as found by the two lower courts; presents no conflict upon the same state of facts with any decision of either state or federal courts.

The facts which exist here are peculiar to this case, and hence of no national importance.

But the lower courts were correct in holding that there is not any accretion to the mainland grants, both as a matter of fact and as a matter of local law.

Once it was determined by both lower courts that the waters of the sea still roll over Laguna Madre, as shown in

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74. R. 1859-60, 1862-3, 1865, 1933-44; 190 F. 2d 193-9.

Joseph M. White's Translation, 1839:

> "By the shore of the sea we understand whatever part of it is covered with water, whether in winter or summer."[73]

The *Joseph M. White Translation of 1839* has been expressly adopted by the Supreme Court of Texas in *State v. Balli*, 144 Tex. 195, 250, 251, 190 S.W. (2d) 71, 100:

> " 'By the shore of the sea we understand whatever part of it is covered with WATER, whether in winter or summer.' * * * (1 White's Recopilacion, p. 70)
>
> "Thus the seashore was no part of the land, but always an adjunct of the sea. * * * The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with WATER of the latter during the whole year, whether in winter or in summer.' "

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The two lower courts in this case applied the foregoing civil law of the Romans and of the Spaniards, as collected by the latter in *Law IV, Title 28, Third Partidas;* concluded, both from the facts and from the applicable local

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73. "White's **Recopilacion**", "A new Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain, Relating to the Concessions of Land in their Respective Colonies; Together with the Laws of Mexico and Texas on the Same Subject. To which is Prefixed Judge Johnson's Institutes of the Civil Law of Spain"; T. & J. W. Johnson, Law Booksellers, Philadelphia, 1839.

law, that Laguna Madre covered the area that is colored in blue on Plaintiff's Exhibit 3; exactly the same area that was covered in 1804, 1832 and 1834, when the grants were issued on the mainland; in 1829, when the grant was issued to Padre Island."[74]

Is this Court interested in again reviewing the same facts and local law?

(2)

There can be no accretion to the bed of the sea. (Reply to Petitioners' Specification of Error No. 2.)

Petitioners' specification of error number two presents nothing but a matter of fact which has been resolved adversely to petitioners by the concurrent findings of both lower courts; presents no federal question whatever; presents only a matter of application of the local law to the facts as found by the two lower courts; presents no conflict upon the same state of facts with any decision of either state or federal courts.

The facts which exist here are peculiar to this case, and hence of no national importance.

But the lower courts were correct in holding that there is not any accretion to the mainland grants, both as a matter of fact and as a matter of local law.

Once it was determined by both lower courts that the waters of the sea still roll over Laguna Madre, as shown in

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74. R. 1859-60, 1862-3, 1865, 1933-44; 190 F. 2d 193-9.

blue on Plaintiff's Exhibit 3, this case terminated. The existence of that fact and the application of the local civil law concluded the case entirely; it determined that the land was still a part of the inland waters of the sea within Laguna Madre, the determination of which conclusively prevented the possible existence of any accretion.[75]

> "Thus the seashore was no part of the land, but always an adjunct of the sea. The classification of the sea and the shore of the sea as common property is as old as *the oldest Roman law*, but by its very nature and meaning there could never be an accession to the seashore as the seashore was defined in the law of Spain, which was effective in Tamaulipas when the grant (of Padre Island) in this case was made. The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with *water* of the latter during the whole year, whether in winter or in summer.'" *State v. Balli*, 144 Tex. 195, 251; 190 S.W. (2d) 71, 100.

It is the foregoing pronouncement of the local law by the Supreme Court of Texas that the Court of Appeals was following in this case in its original opinion when it said:

> "The appellants (petitioners here) do not assert a grant from any sovereign to this controverted area, but they claim it by accretion to the shore of the mainland. * * * The burden of proving this was on appellants; and we think, upon the undisputed facts, that they failed to meet this burden."[76]

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75. R. 1841-3, 1863, 1865, 1942-4; 190 F. 2d 199.

76. R. 1942-3; 190 F. 2d 199.

Petitioners failed to meet the burden, for the simple reason that the findings of fact by the two lower courts that the inland waters of the sea still cover Laguna Madre as much as nine months in the year, and hence by the applicable civil law Laguna Madre is still an inland arm of the sea, thereby under the rule announced in *State v. Balli* prevents accretion to the bed of the sea. That is to say, regardless of the fact that elevations in places may have been one inch or more above sea level—not above sea water—is of no consequence, just so long as the waters of the sea still continue to roll on and over this elevated land; just so long as "the water is extremely salty"; just so long as the water of the sea "covers all of the land in controversy for substantial and appreciable portions of the year"; just so long as this water at times "contains literally millions of seafish, seagulls and pelicans are seen feeding on fish"; just so long as "the water varies from three or four inches to many feet in depth"; just so long as "seaplanes can and have landed upon it" and "boats navigate it safely"; just so long as the "waters of the south and north basins are joined"; just so long as "the various islands are isolated by water"; just so long as the recession of the water leaves "salt" deposited, whereupon "fish die, and all of the area, except that on the beaches, is mud, sand and leathery algae"; just so long as "there is no grass or plant life of any kind in the entire area, except upon the islands", there cannot possibly be any accretion.[77]

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77. R. 1837-43, 1863, 1865, 1938-40, 1942-4; 190 F. 2d 196-7, 199.

On the opposite page is Plaintiff's Exhibit 614,[78] a picture of the witness Tanner's seaplane taking off from the waters of Laguna Madre on April 5, 1949, just northwest of Toro Island, within a part of Sun Section 302 or the north end of Sun Section 310. Does it appear the sea has abandoned Section 302 and 310? Can there be accretion under these waves of the sea?

The mere elevation of land does not constitute accretion. There must be contiguity of the alleged "accretion" to the mainland grants. *Fulton v. Frandolig*, 63 Tex. 330.

> "Because a portion of the sea has no shore, it does not follow that it has no bed. The area in controversy was formerly the bed of the sea. The burden on the appellants was two fold: first, to prove that the sea had abandoned this area; second, to prove that appellants had acquired it by accretion or reliction. According to the findings below, the appellants did not meet either burden. * * *"[79]
>
> "'The line of demarcation between the Laguna and the Mainland is still patent for all to see. The area in controversy * * * is not fast land.'"[80]

The trial court found:

> "I am of the opinion, and so find that there has not been any substantial change or building up of the area since the original surveys."[81]

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78. Orig. filed with Record.
79. R. 2196; 191 F. 2d 716.
80. R. 2195; 191 F. 2d 716.
81. R. 1842.

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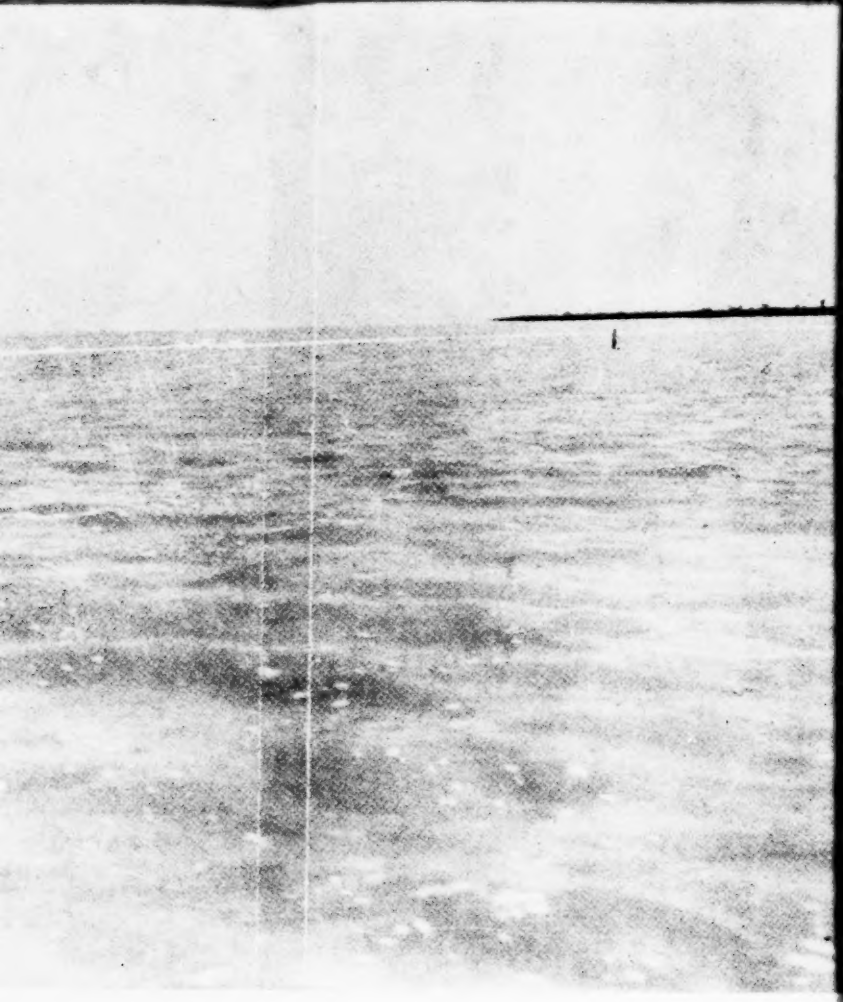

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The Court of Appeals, after making its own independent finding "upon the undisputed facts" that appellants failed to meet the burden of showing accretion, went on to say:

> "If we are incorrect about this as a conclusion of law, and contrary reasonable inferences may fairly be drawn from the undisputed evidence, then the lower court's finding as to the alleged accretions is against appellants; and *we cannot say that it is clearly erroneous, the finding being that there has not been any substantial change or building up of the area since the original surveys.*"[82]

Is this Court interested in certiorari in a matter that is purely factual, and about which the facts have been concurred in by two lower courts; to which there is nothing to be applied except the local law, which the two lower courts have properly applied?

(3)

The respondent Sun proved a title by formal conveyance from the State of Texas, which owns the lands under the inland waters of Laguna Madre. (Reply to Petitioners' Specification of Error No. 3.)

Petitioners' specification of error number three presents a matter that could apply only to this case and the parties here; of no national importance whatever; involving no federal law of any kind; a matter of local land law, and hence presents no reason for certiorari.

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82. R. 1943; 190 F. 2d 199.

But the two lower courts were correct in finding, both as a matter of fact and law, that respondent Sun had proved a valid conveyance from the State of Texas, which is the owner of the land under the inland waters of Laguna Madre.[83]

> "The soil covered by the bays, inlets and arms of the Gulf of Mexico, within tidewater limits, belongs to the State, and constitutes public property which is held in trust for the use and benefit of all the people." *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 56, 175 S.W. (2d) 410; *Landry v. Robison*, 110 Tex. 295, 219 S.W. 819; *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W. (2d) 1028.

Acts 1939, 46th Legislature, page 465, section 5, now *Article 5421c-3, Revised Statutes of Texas, 1925* provides: "The mineral estate * * * within tidewater limits, * * * including islands, lakes, bays, and the bed of the sea, belonging to the State of Texas, are hereby set apart and dedicated to the permanent school fund."[83a]

When the trial court and the Court of Appeals concurred in finding as a fact that "there is a regular movement of sea water, repeated many times throughout the year, over all or part of the lands in controversy," and applied the local law, it thereby fixed the ownership of the lands beneath the inland waters of Laguna Madre to be in the State of Texas, subject to the oil and gas leases

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83. R. 1863, 1944; 190 F. 2d 199.

83a. R. 2195; 191 F. 2d 716.

which it had executed and delivered to the respondent Sun.[84]

The title of the respondent Sun is reflected by:

(1) Formal written oil and gas leases from the State of Texas to it, dated February 3, 1948, for which it paid the aggregate sum of $780,915.60;[85]

(2) The proof by it that the lands described in its oil and gas leases are beneath the inland waters of Laguna Madre;[86]

(3) By the application of the local law, which requires that these lands beneath these inland waters of Laguna Madre be classified as the bed of the sea.[87]

The respondent Sun would have proved a prima facie title by the mere introduction of its formal written leases from the State, unaccompanied by other proof, because the State of Texas is presumed to own all of the land within its boundaries. *State v. Delesdenier*, 7 Tex. 76, 96-7.

The Court of Appeals correctly concluded that the respondent Sun showed a title "which it acquired from the state or sovereign that had a good title to the submerged land in controversy."[88] "Its leases from the State, and its

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84. R. 1837-43, 1863, 1865, 1938-40, 1942-4; 190 F. 2d 196-7, 199.

85. R. 990; P. Ex. 622, R. 972-90; Sun's (Respondent's) Original Brief, Court of Civil Appeals, pp. 142-7.

86. R. 1837-40, 1842, 1865, 1937-40; 190 F. 2d 196-7.

87. R. 1859-60, 1863, 1935-40, 1942; 190 F. 2d 194-7, 199.

88. R. 2194; 191 F. 2d 715.

proof as to the submerged character of the land, made a *prima facie* case in its behalf under our announcement of the applicable local law."[89]

Respondent recovered below upon the strength of its own title. Petitioners have no title whatever.

Is this Court interested in certiorari involving a matter that deals only with peculiar facts in this particular case, when both lower courts have concurred in fact and in law that respondent has proved a title, tested, as it must be, by local law?[90]

(4)

The respondent Sun has not made any "judicial admission" with respect to "accretion", and the lower courts were correct in so holding. (Reply to Petitioners' Specification of Error No. 4.)

Is this Court interested in granting certiorari in this case, based upon a specification of error about a procedural matter that could only involve the parties to this particular case; that could not possibly be of national importance; that could not be in conflict with any other federal or local decision?

But the lower courts were correct in holding that respondent has not made any "judicial admission" with

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89. R. 2190; 191 F. 2d 713.

90. R. 1863, 2190, 2194; 191 F. 2d 713, 715.

respect to "accretion" that would require this Court to completely disregard and overturn the undisputed facts which support the findings of the two lower courts that "there is a regular movement of sea water, repeated many times throughout the year, over all or part of the lands in controversy"—the controlling fact inquiry. When it is determined that there is "a regular movement of sea water" over the land in controversy, then the question of alleged "accretion" becomes immaterial.[91] "There could never be an accession to the seashore, as the seashore was defined in the law of Spain, which was effective in Tamaulipas when the grant (to Padre Island) in this case was made. The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with WATER of the latter during the whole year, whether in winter or in summer."[92]

In other words, petitioners would have this Court decide a moot case, as Justice Brandies said in *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722, by giving effect to what petitioners call a "judicial admission" contrary to the undisputed facts; contrary to all of the applicable local law; contrary to the findings of fact, concurred in by both lower courts, that there can be no "accretion" to the bed of the sea under local law; that there is no contiguous "accretion" as a matter of fact to the mainland grants owned by petitioners.[93]

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91. R. 1885-6, 2190-6; 191 F. 2d 713-6.

92. State v. Balli, 144 T. 195, 251; 190 S.W. 2d 71, 100.

93. R. 1841-3, 1865, 2195, 2196; 191 F. 2d 716.

The full review of the proceedings which were had in the trial court from the close of the evidence on January 27, 1950, to the conclusion of the oral arguments on Tuesday morning, January 31, 1950, is found at pages 2000 to 2038, Volume VII of the Record in this Court.

Summarized, the chronology of events AFTER THE CLOSE OF ALL THE EVIDENCE, shows:

(1) The evidence of all parties was closed on Friday morning, January 27, 1950.[94]

(2) After the retirement of the jury, the trial court invited a discussion of questions of law; motions that would be filed by the respective parties; what issues of fact, if any, were to be submitted to an advisory jury which he had impaneled in this equity case. It was during the discussion of these questions of law, and after all the evidence of all parties had been closed, that the statements were made by counsel for the respondent Sun, which the petitioners now attempt to turn into a "judicial admission" which would contradict all the evidence introduced by all parties below; contradict the findings of fact concurred in by both lower courts; contradict the applicable local law which requires the findings of fact and conclusions of law that "accretion" cannot, as a matter of law, exist in behalf of the petitioners in this case.[95]

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94. R. 2009.

95. R. 2009-27.

(3) Arguments on motions for instructed verdicts by all parties were commenced before the Court on January 30, 1950, and consumed that day.[96] It was in the afternoon of that day that Mr. Jones, leading counsel for petitioners, was pressed by the trial court to state if there were any controverted issues of fact, and replied:

> "It is perfectly true, of course, that the testimony, *and not the view of the lawyers on the testimony*, should be used in determining whether a fact issue exists."[97]

This statement was made by counsel for petitioners three days subsequent to January 27, 1950, the date it is now claimed by petitioners the so-called "judicial admission" was made by counsel for respondents, which would contradict the findings of fact and the conclusions of law and decrees of the two lower courts in this cause. It conclusively shows that on January 30, 1950, counsel for petitioners had not given any effect whatever to any statement that had been made by counsel for respondents on the preceding January 27, 1950, after all the evidence of all parties had been closed.

The statement that is claimed to be a "judicial admission" cannot, under either federal or local decisions, be construed as a "judicial admission". "The statement was made after the close of all the evidence; no proof was withheld by the appellants on account of it; and the dis-

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96. R. 2027-32.

97. R. 2029-30.

charge of the jury was not a prejudicial event but was desired and urged by both sides, though for different reasons. Not every statement made by counsel casually, or in the heat of argument, or in colloquy with his adversary, is binding upon his client. It must have been deliberately made for the purpose of being used at the trial as a substitute for legal evidence of the fact. *Beattie Mfg. Co. v. Gerardi, Mo. Sup.*, 214 S.W. 189, 192; 1 Greenleaf on Evidence, Sec. 205; 1 Enc. Ev. 467; 31 C.J.S., Evidence, § 381, page 1171. *Cf. Platt v. U. S.*, 10 Cir., 163 F. 2d 165, wherein the court said that it was doubtful if the statement by appellant's attorney in respect to the matter could be construed as a stipulation as to a finding of fact, but, in any event, that parties may not stipulate the findings of fact upon which conclusions of law and the judgment of the court are to be based; that parties may by stipulation establish evidentiary facts to obviate the necessity of offering proof, but based thereon the court must itself find the ultimate facts upon which the conclusions of law and the judgment shall rest.

"In *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722, the court says that the stipulation is obviously inoperative if it is to be treated as an agreement concerning the legal effect of admitted facts, since the court cannot be controlled by agreement of counsel on a subsidiary question of law; that if the stipulation is to be treated as an attempt to agree, for the purposes of review only, that what are the facts shall be assumed

not to be facts, a moot case is presented; that the duty of every judicial tribunal is limited to determining rights that are actually controverted in the case before it; and that no stipulation of parties or counsel can enlarge the power or affect the duty of the court in this regard. The court, therefore, treated the stipulation as a nullity. This principle was adopted by the Supreme Court of Texas in *Reynolds v. McMan Oil & Gas Co.*, 11 S.W. 2d 778, 785-7, wherein the court said that expressions of opinions as to the law of the case by counsel are not binding upon either his client or the court, citing 2 R.C.L., p. 989; also 25 R.C.L. 1098."[98]

The total immateriality of petitioners' specification of error number four is found in the Court of Appeals opinion:

> "The appellants now are not complaining of the discharge of the jury in itself, but of the court having made findings of fact after having decided the case on the undisputed facts. Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.A. provides that, in all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Moreover, after urging the elimination of the State as a party, the appellants in their original brief urged this court to decide the case on the merits if possible. In brief and oral argument, they stated that the trial was lengthy, arduous, and expensive; that the case was fully developed by both sides; and that they should consider it

98. R. 2191-2; 191 F. 2d 714.

most regrettable if the entire case should be sent back for another trial."[99]

Is this Court interested in repealing Rule 52(a)? Is this Court interested in granting certiorari about a purely procedural matter that could not be a precedent in any other case; a purely procedural matter that does not in fact have anything to do with the ultimate outcome of the case presented?

(5)

This Court is not interested in reviewing again the facts which have been concurred in by the two lower courts. (Reply to Specification of Error No. 6.)

This Court has said it is "a court of law, * * * rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275; 69 S.Ct. 535; 93 L.Ed. 672.

The petitioners complain that the trial court did not adopt their evidence; did not adopt their theory of the case; did not make findings in conformity with what petitioners contend are the facts. A precise contention was made by the Government in *U. S. v. Yellow Cab Co.*, 338

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99. R. 2192; 191 F. 2d 714.

U.S. 338, 70 S.Ct. 177, "the Government saying that the trial court 'ignored * * * substantially all of the facts which the Government deemed significant.'" Justice Jackson upheld the findings of the District Court:

> "There is no exception which permits it (the Government), even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. * * * the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. SUCH A CHOICE BETWEEN TWO PERMISSIBLE VIEWS OF THE WEIGHT OF THE EVIDENCE IS NOT 'CLEARLY ERRONEOUS.'"

All of the evidence of respondent Sun showed that "there is a regular movement of sea water, repeated many times throughout the year over all or part of the lands in controversy, with regularity."[100] Thereupon petitioners introduced witnesses who had flown planes over Laguna Madre for more than a year prior to the trial; who had prepared more than five hundred separate maps that showed the daily movement of the inland waters of the sea over Laguna Madre; such maps completely confirm the testimony that had previously been introduced by the respondent Sun; so that at the close of all the evidence of all the parties, it was the uncontradicted evidence of witnesses who had been on the ground; witnesses who had been in the

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100. R. 1840, 1940; 190 F. 2d 197.

air; witnesses who had taken photographs on the ground and from the air; as well as official maps prepared by official State and Federal authorities through the years, and every other piece of evidence, oral and documentary, that "there is a regular movement of sea water, repeated many times throughout the year over all or part of the lands in controversy, with regularity."[101]

Is this Court interested in saying that the lower courts should have violated Rule 52(a), and refused to file findings of fact, as required by that rule?

Is this Court now interested in wading through sixteen hundred pages of oral evidence and twelve hundred separate exhibits to decide for itself whether or not "there is a regular movement of sea water, repeated many times throughout the year, over all or part of the lands in controversy, with regularity"?

Petitioners' specification of error number six presents nothing of national importance; nothing that involves any conflict with any prior local or federal decisions; nothing that would appeal to the discretion of this Court to grant certiorari. It presents nothing but a plea that this court abolish Rule 52(a).

It is immaterial that there was any so-called "build-up" of the bed of Laguna Madre, when the uncontradicted facts show that the inland waters of the sea continue to this very

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101. R. 1837-1840, 1938-1940; 190 F. 2d 196-7; P. Ex. 12-50, 92-570, 595-611, Orig.; R. 1072-6; D. Ex. 23-29, Orig.; R. 1222-4.

hour to roll upon and over the so-called "build-up" "for substantial and appreciable portions of the year".[102]

The trial court saw fit to see and hear and believe and find, that "there has not been any substantial change or building up of the area since the original surveys".[103] The trial court, who saw the exhibits; saw the witnesses; heard the testimony; lived in the community, did find that "the line of demarcation between the Laguna and the mainland is still patent for all to see".[104]

(6)

This is an action in equity to remove cloud and to enjoin petitioners from interfering with respondent's development of oil and gas under its title which it holds from the State of Texas. (Reply to Petitioners' Specification of Error No. 5 and brief thereon, page 41.)

Respondent in its amended complaint alleged:

> "Plaintiff, Sun Oil Company, is now in possession of each of said tracts of land, having camps located thereon, having made surface and geophysical surveys and other work and now exercises actual and physical possession of said lands."[105]

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102. R. 1839, 1939, 2195; 190 F. 2d 197, 191 F. 2d 716.

103. R. 1842, 1943, 2195; 190 F. 2d 199, 191 F. 2d 716.

104. R. 1843, 1838, 1938; 190 F. 2d 196.

105. R. 67-8, 1881, 2181; 191 F. 2d 708.

The uncontroverted facts support the foregoing allegations.[106]

The uncontroverted facts and the allegations of the petitioners disclose that they are not now in possession, and have never been in possession.[107] For one hundred years that they have owned the mainland grants they have never paid taxes on the land in controversy prior to 1949.[108]

The uncontroverted facts show that Sun Oil Company has camps, machinery, employees; large markers, with its name and section numbers, on the corner of each of the sections upon which it has leases; that it drives weasels, marsh buggies and other adaptable types of conveyances upon, across and over the lands in controversy day after day, and makes use of the land in controversy consistent with ownership.[109]

The Court of Appeals found that "the record shows that it (respondent Sun) had such possession as the character of its leasehold interest entitled it to exercise."[110]

Holland v. Challen, 110 U.S. 15, 3 S.Ct. 495, 28 L.Ed. 52, completely controls this case. The very lengthy and detailed opinion of the Court of Appeals on motion for rehearing analyzing *Holland v. Challen;* analyzing the

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106. R. 165-72, 339, 366, 368-70, 412-19, 440-52, 674-99.

107. R. 2182, 2189; 191 F. 2d 708-9, 712.

108. R. 1846, 1850, 1854.

109. See Footnote 106.

110. R. 2189; 191 F. 2d 712.

allegations of the parties; analyzing the facts, and concluding that this suit is an equitable proceeding is so excellent that we could not improve upon it by any statement or argument.[111] Suffice it to say that *Article 7364 of the Revised Civil Statutes of Texas of 1925* cannot limit the equity jurisdiction of federal courts. "Such jurisdiction is not ousted by state legislation providing a remedy by an action at law."[111a]

The Court of Appeals is correct in holding that the Texas statutes do not limit, but enlarge, the equity jurisdiction. The absence of a remedy at law must be tested by the federal decisions.[112]

Respondent Sun holds a conveyance from the State of Texas of a leasehold estate to the oil and gas under certain sections in Laguna Madre; it is entitled to the enjoyment of that estate for the drilling of oil wells; it is entitled to be freed from the embarrassment and threat of litigation evidenced by the filing by petitioners in the General Land Office of Texas and with the School Land Board of Texas of written assertions challenging its right, title and use of the leases for which it paid a large sum of money. For that very reason, "the titles to minerals in place may be freed from adverse claims by a suit to quiet title thereto, or to remove clouds therefrom."[113]

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111. R. 2181-2206; 191 F. 2d 705-21.

111a. R. 2199; 191 F. 2d 718.

112. R. 2184-8; 191 F. 2d 711-2.

113. R. 1863, 2190-1; 191 F. 2d 713.

The equity jurisdiction of federal courts to remove clouds from title has been so long settled by so many decisions, both by this Court and by various Courts of Appeals, commencing with *Holland v. Challen*, down to and including the present time, that it is of no consequence to this Court now to grant certiorari merely for the sake of another review of that which has long since been settled.

(7)

Respondent Sun has not filed any disclaimer of its leasehold title under any of the sections in Laguna Madre. (Reply to Petitioners' Specification of Error No. 7.)

Is this Court interested in granting certiorari to determine the simple, academic question of disclaimer or no disclaimer in a case that could not have any effect upon any other parties except those to this particular suit; that could not have any national importance; that could not possibly involve any federal question; that could not possibly involve anything except the peculiar facts to this particular case, to which local law must be applied?

But, in fact, there has not been any disclaimer by respondent Sun. Respondent Sun proved its title by:

(1) Formal written oil and gas leases from the State of Texas to it, dated February 3, 1948.[114]

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114. R. 990, 1863.

(2) Proof that the land described in those oil and gas leases is now beneath the inland waters of the sea in Laguna Madre, in that "sea water rolls over the lands in controversy throughout the year";[115]

(3) The application of the civil law, as pronounced by the Supreme Court of Texas in *State v. Balli*, "All that ground is designated the shore of the sea which is covered with the water of the latter during the whole year, whether in winter or in summer."[116]

Respondent Sun never did claim any title by accretion to Padre Island.[117] It claimed title by conveyance from the State of Texas to certain sections of land in Laguna Madre that had been officially sectionized by the State;[118] offered for lease by the State as "submerged" lands,[119] for which it paid the aggregate sum of $780,915.60;[120] received delivery of its oil and gas leases; placed them of record in the Deed Records of Kenedy County, Texas;[121] and went into possession of the lands covered by such oil and gas leases.[122]

The only claim of "disclaimer" is the statement made by respondent Sun that it did not claim title by accretion

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115. R. 1840, 1939, 2190-1; 190 F. 2d 197, 191 F. 2d 713.

116. 144 Tex. 195, 251; 190 S.W. 2d 71, 100.

117. R. 2196; 191 F. 2d 716.

118. R. 1854.

119. P. Ex. 621, R. 973.

120. R. 990; P. Ex. 622, R. 972-90.

121. R. 990, 1477, 1486.

122. See Footnote 106.

to Padre Island. It never has claimed title by accretion to Padre Island, or to the mainland, or anywhere else.

The petitioners do not even pretend that respondent Sun has ever filed any disclaimer in this case. They attempt to use a formal statement that Sun did not claim by "accretion" to Padre Island and stretch it into a "disclaimer". Does any such contention, unsupported by the facts; of such insignificance that it was not even noted by the two lower courts, appeal to this Court as a ground for certiorari in this case?

CONCLUSION

Respondent prays that the Court refuse the writ for certiorari.

Respectfully submitted,

CHAS. D. TURNER
FRITZ L. LYNE
J. W. TIMMINS
MARTIN A. ROW
CARLTON R. WINN
Counsel for Respondent.
Sun Oil Company

JAN 21 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,
NELSON JONES,
Counsel for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 481

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

SUN OIL COMPANY, *Respondent*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Under the applicable Spanish Law, as well as at Common Law, the TIDE limits the shore.

Recognizing that its sole claim must fail unless the land in suit is "seashore" under Spanish law, respondent argues that *tide* is not the criterion for determining the boundary of the shore under Spanish law. Respondent says:

> "* * * the Spaniards were not concerned with astronomical tides. They were concerned, precisely as the Romans were concerned, with nothing but sea water; the extent to which the waves of the sea rolled in normal times." (Brief for Respondent, p. 24.)

Upon this contention hangs respondent's entire case; this is the basis upon which respondent seeks to uphold the decision of the lower court. Yet this very contention was expressly rejected by the Court of Appeals, which held that *tide*, and nothing else, limits the seashore under Spanish law as well as at Common law. Respondent's contention is wholly incompatible with the holding of the Court of Appeals on the controlling question, as demonstrated by the following quotation from the opinion:

> "Under the civil law, from the Institutes of Justinian until the present time, the seashore has been common property, and the alluvion that was added thereto belonged to the owners whose lands were bounded by the sea. This precept of the Roman law remains today as the guiding principle in both civil and common-law jurisdictions unless changed by code or statute * * * The low *tide** line is the seaward boundary of the shore in both civil and common law countries * * * By the civil law, the shore extends to the line of the highest *tide* in winter. *Galveston v. Menard*, 23 Tex. 349; *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559; *DeMerit v. Robison*, 102 Tex. 358; *Heard v. Town of Refugio*, 129 Tex. 349 * * *
>
> "There would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by the wind * * * The tide is another matter; there is nothing erratic about it. The tide is the rising and falling of the water of the sea that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons or other circumstances * * * *The tide delimits the shore, and it is no respecter of the conflict of laws* * * * Shore is sometimes said to be synonymous with 'flats'; 19 Cyc. 1078; 29 Cyc. 355; but *flats are not*

* Emphasis supplied throughout unless otherwise indicated.

> *shore unless the tide ebbs and flows over them* * * * *"* (R. 1935-1936; 190 F. 2d 194-195.)

Under this holding the flats in controversy could not be "seashore" because the tide does not ebb and flow over them. The fact that the tide does not ebb and flow over this land is undisputed. The Court of Appeals said:

> "*It was admitted by plaintiffs* below that the land in controversy, at the time of suit, was above sea level and above mean high tide, and *that the waters of Laguna Madre encroached upon this land only when blown there by the wind.*" (R. 1933; 190 F. 2d 194.)

The holding that *tide* determines the boundary between seashore and upland under Spanish law undoubtedly is correct. Any other holding would conflict with the definition of "seashore" contained in Las Siete Partidas. In Texas the accepted translation of the Partidas is by S. P. Scott, published for the Comparative Law Bureau of the American Bar Association. That translation, which is cited by respondent, contains the following definition of "seashore":

> "* * * All that land is designated the shore of the sea which is covered with the water of the latter *at high tide* during the whole year, whether in winter or in summer."

Respondent avoids the words "at high tide" by simply deleting them whenever quoting from Las Siete Partidas. Such deletion occurs on pages 2, 3, 4, 33 and 45 of respondent's brief; in no instance does respondent quote the definition as it appears in Scott's translation. In STATE v. BALLI, 144 Tex. 195, 250, the Texas Supreme Court expressly adopted the Scott translation (exactly as it appears in Mr. Scott's book) as a correct statement of the Spanish law.

All of the Texas decisions recognize *tide* as the controlling factor in the Spanish law concept of *seashore*. (See GALVESTON v. MENARD, 23 Tex. 349, 399; GALVESTON CITY SURF BATHING CO. v. HEIDENHEIMER, 63 Tex. 559, 562; DEMERIT v. ROBISON, 102 Tex. 358, 361.) There is no Texas decision which supports respondent's contention.

There is no translation of the Partidas which supports respondent's contention. It is plain that the Spaniards disagree with respondent. In 1815 King Ferdinand 7th promulgated an order giving registered seafaring men the free right to sell fish on seashore and piers. This order described the shore as " * * * All that space which the water of the sea bathes in its daily flux and reflux and twenty ordinary varas more above the high tide mark." [1] King Ferdinand's order continued as a part of the law of Mexico after Mexico achieved its independence.[2] There can be no doubt that seashore, as defined in Las Siete Partidas, means land covered by the daily ebb and flow of the *tide* to the Spaniards, the Mexicans, the Texas courts and to the Court of Appeals.

The decision of the Court of Appeals cannot be reconciled with the applicable local decisions.

Respondent does not attempt to distinguish STATE v. BALLI, 144 Tex. 195, and does not deny that the BALLI decision is squarely in conflict with the decision in the present

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[1] Las Leyes Federales Vigentes sobre Tierras, Bosques, Aguas, Ejidos, Colonizacion y el Gran Registro de la Propiedad por el Lic. Niceto Villamar and S. Moreno Cora, page 372, Second Edition, Mexico, 1900.

[2] Code of Colonization and Vacant Lands of the Republic of Mexico; arranged by Francisco F. de la Maza, published agreeable to resolution of the President of the Republic, Mexico, 1893, pages 488-489. Id. pp. 711-713. Id. pp. 1106-1111.

case. These two cases involve the same question of local property law arising out of identical factual situations. Yet the Court of Appeals reached a result opposite to the result reached in the BALLI case. Respondent recovered in the BALLI case on the ground that *tide* marks the boundary between a Mexican grant and Laguna Madre. Application of this principle of local law to the admitted facts of the present case necessarily would defeat respondent's claim.

The Court of Appeals did not hold that the land in controversy is "seashore". Its decision is expressly based upon the holding that petitioners failed to prove that the land in suit accreted to petitioners' grants. That holding is contrary to the fundamental rule that a plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. Respondent claims that it proved a prima facie title by introducing in evidence its leases from the State, citing STATE v. DELESDENIER, 7 Tex. 76. That case is not authority for respondent's contention because it is applicable only to a suit by the State. No Texas decision holds that a lessee from the State has the benefit of any presumption. On the contrary, a lessee from the State must, like any other plaintiff, recover upon the strength of its own title. Furthermore, such a presumption would not aid respondent, since the land in suit admittedly is above the reach of the *tide*.

Petitioners would be entitled to judgment as to certain of the tracts in controversy even if the evidence showed conclusively that no accretion has occurred. The line of mean high tide and highest tide in winter is shown on Defendants' Exhibit 20, attached to the petition. That line runs along the east side of Tracts 273, 280 and 281. Petitioners' grants call for Laguna Madre as their eastern boundary. The enumerated tracts must be included in Los Mirasoles and Little Barreta in order to give effect to the call for

Laguna Madre. If these tracts are not included in these grants, then the grants are not bounded by Laguna Madre at all. It is a fundamental rule of local law, recognized since the earliest Texas decisions, that a call in a grant for a body of water as a boundary must be given controlling effect in locating the grant. Respondent makes no effort to justify the decision of the Court of Appeals which disregarded the call for this natural object.

Conclusion

WHEREFORE, petitioners pray that this Court issue a writ of certiorari, directed to the United States Court of Appeals for the Fifth Circuit, and that the judgment of the Court of Appeals and the judgment of the District Court be reversed by this Honorable Court.

HUMBLE OIL & REFINING COMPANY,
MRS. SARITA K. EAST,
MRS. ELENA S. KENEDY,
Petitioners

By GORDON BOONE,
ALLEN V. DAVIS,
JACOB S. FLOYD,
ROBERT H. KELLEY,
R. E. SEAGLER,
REX G. BAKER,
K. C. MINTER,
CHARLES E. SHAVER,

NELSON JONES,
Counsel for Petitioners

J. Clark

Office - Supreme Co
FILE
JAN 24 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

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HUMBLE OIL & REFINING COMPANY, ET AL.,
Petitioners

v.

SUN OIL COMPANY,
Respondent

On Petition For A Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION

PRICE DANIEL
Attorney General of Texas
JESSE P. LUTON, JR.
Assistant Attorney General

BEN H. RICE, III
Of Counsel

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---

BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 190 F. 2d 191. The opinion of the Court of Appeals on petition for rehearing is reported at 191 F. 2d 705. The opinion of the District Court on the intervention of the State of Texas is reported at 88 F. Supp. 658.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT

This suit was instituted by respondent, Sun Oil Company, a New Jersey corporation, against petitioners, Mrs. Sarita K. East and Mrs. Elena S. Kenedy, both citizens of Texas, and Humble Oil & Refining Company, a Texas corporation, lessee of the Kenedy Ranch. The purpose of the suit is to remove cloud from the title to 26 described tracts leased by the State of Texas to respondent in Laguna Madre, a lagoon between the mainland and Padre Island, in Kenedy County, Texas, and to enjoin petitioners from interfering with the development of the area by respondent for oil and gas purposes. The State of Texas was allowed by the trial court to intervene under its claim of ownership of these tracts and the minerals thereunder, subject to the oil and gas leases held by Sun.

Petitioners claimed title to the area by accretion or reliction to their mainland grants (Big Barreta, Los Mirasoles, and Little Barreta), issued by Spain and the Mexican State of Tamaulipas. Respondent and the State of Texas contended that the area is a part of the seashore under the controlling civil law and also that none of the area has become a part of petitioners' mainland grants as a result of accretion or reliction. These allegations and contentions are fully set forth in the opinion of the Court of Appeals (190 F. 2d at 193-194), the pertinent portions of which are quoted on pages 2-3 of the petition for certiorari.

After filing extensive findings of fact and conclusions of law (R. 1829-1868), the trial court rendered judgment for respondent and the State of Texas, adjudging the State to be the owner of the area, subject to the oil and gas leases held by respondent, removing

the clouds from the title of the State and respondent, and enjoining petitioners from interfering in any way with respondent and the State in the development of the area for oil and gas (R. 1895-1910).

The Court of Appeals reversed the action of the trial court in allowing the intervention of the State and denied the petition to intervene; otherwise, the judgment was modified so as not to be binding upon the State, and as so modified the judgment was affirmed.

ARGUMENT

I.

The Court of Appeals correctly held that the controverted area has not become a part of petitioners' mainland grants by accretion or reliction.

The issue in this case is whether the portion of Laguna Madre in controversy has become a part of petitioners' mainland grants as a result of accretion or reliction. As stated by the Court of Appeals:

> "The appellants do not assert a grant from any sovereign to this controverted area; but they claim it by accretion to the shore of the mainland. The crucial question for determination is whether land, which admittedly was a part of the original bed of Laguna Madre and outside of appellants' mainland grants, has become a part of the mainland under the doctrine of accretion." (190 F. 2d at 199.)

Respondent established a prima facie case by introducing in evidence oil and gas leases from the State covering the area in question. *Short v. W. T. Carter & Bro.*, 133 Tex. 202, 219, 126 S.W. 2d 953, 963 (1938); *Schneider v. Lipscomb County Nat. Farm Loan Ass'n,*

146 Tex. 66, 75, 202 S.W. 2d 832, 837 (1947). The burden then devolved upon petitioners to prove that the location of the boundary line of their mainland grants had been changed by accretion or reliction so as to include this area. *Peterson v. City of St. Joseph,* 348 Mo. 954, 156 S.W. 2d 691 (1941); *In re East River Drive, Borough of Manhattan, City of New York,* 289 N.Y.S. 433 (1936); *Meeker v. Kautz,* 213 Iowa 370, 239 N.W. 27 (1931); *Mercurio v. Duncan,* 131 Neb. 767, 269 N.W. 901 (1936); *Hauber v. Gentry,* 215 S.W. 2d 754 (Mo. Sup. 1948); 65 C.J.S. 183, Navigable Waters, Sec. 85.

Petitioners rely primarily upon the fact that this area is above the reach of the daily ebb and flow of the tide. Petitioners' principal witness was Dr. Fisk, an employee of Humble Oil & Refining Company, who said that the area "gradually filled up, layer on layer, until it reached sea level, and then built up to its present sea level position, at which time the flats became connected with the mainland, and that accumulation has been continuing layer on layer, even now, where it is, in places, several feet above sea level." (R. 1289.) No evidence was presented by petitioners of any gradual and imperceptible addition of sediment to their shore line so as to extend the shore into Laguna Madre or that the water began receding from their shore line.

The Court of Appeals summarized the evidence and findings as to the physical features of this area and the action of the water in covering the area as follows:

> "From maps, photographs, aerial mosaics, and the oral testimony of witnesses, the court below found that what commonly has been regarded as Laguna Madre, prior to this controversy, is clearly

defined and easily visible. Around the grass line on the island and the mainland, there is a short sandy beach, which constitutes the shore of Laguna Madre, Spanish for mother lake or lagoon. The area in controversy is above sea level, sloping according to the contour from one one-hundredth of a foot above sea-level to three or four feet. Some of the islands in Laguna Madre at their high points are as much as 25 feet or more above sea level. It is impossible to determine what has accreted to the islands and what to the mainland. Deer and rattlesnakes have been seen on some of the islands in the Lagoon; on some of them are grass, cactus, sunflowers, and heavy brush, including large mesquite trees, especially on Toro Island.

"Waters of the Laguna Madre stand throughout the year from Corpus Christi Bay on the north to a point approximately even with the south end of Lopena Island; and from the Brazos-Santiago Pass near Brownsville, on the south, to and including Redfish Bay, at a point less than a mile from Block 369, one of the tracts in controversy. It is from these bays and passes that sea water rolls over the lands in suit, throughout the year, driven by the prevailing winds, which continue from 9 to 10 months of the year. Within 24 hours after these strong winds start blowing, the waters of the sea roll in rapidly, inundating great portions of the entire area, including the inlets between the various islands and the shore of the mainland. The sea water rolls over the small sandy beaches to the grass lines leaving foam, driftwood, and the like. The water is extremely salty; it covers all of the land in controversy for appreciable portions of the year. At such times this water contains literally millions of seafish; seagulls and pelicans are seen feeding on the fish. The water varies from three to four inches to many feet in depth; seaplanes can and do land upon it, and

> boats navigate it safely. Often the waters of the south and north basins are joined, and the various islands are isolated by water. When the water recedes, salt is deposited, fish die, and all of the area, except that on the beaches, is mud, sand, and leathery algae. During the dry season a large part of the area is dry. There is no grass or plant life of any kind in the entire area, except upon the islands. Some testimony dealt with the effect of storms and rainfall, but the court below thought that this had no substantial effect upon the movement of sea water over the lands in controversy. The finding is that sea water rolls over the entire area throughout the year, irrespective of storms or rainfall; that the movement of this sea water over the entire area is formidable, the pictures resembling general coastal water with considerable waves; and that there is a regular movement of sea water repeated many times throughout the year over all or part of the lands in controversy, but that this movement is caused by the prevailing winds and not by the ebb and flow of the tide." (190 F. 2d at 196-197.)

It is clear that under the above evidence, which is undisputed, the Court of Appeals correctly held that petitioners had not proved that this area has become a part of their mainland grants by accretion or reliction.

The controlling principle is stated in *Hammond v. Shepard,* 186 Ill. 235, 243, 57 N.E. 867, 868 (1900), as follows:

> "All of the authorities agree that, in order that a shore owner take land by way of accretion or reliction, it must appear that the addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition must be by slow and imperceptible processes."

In 56 Am. Jur. 897, Waters, Sec. 483, it is said:

> "In order to effect a change of boundary, formations resulting from accretion or reliction must not only be made to the contiguous land, but must operate to produce an expansion of the shore line outward from the tract to which they adhere."

For similar statements of this principle, see *Perkins v. Adams,* 132 Mo. 131, 33 S.W. 778 (1896); 1 Kinney, *Irrigation and Water Rights* (2d ed. 1912) 928; 1 Farnham, *Waters and Water Rights* (1904) 320; Houck, *Navigable Rivers* (1868) 147-148; 65 C.J.S. 179, Navigable Waters, Sec. 82.

It is thus established that "accretions belong to the land from which they begin and, in order to entitle the riparian owner to the alluvion, the accretion must begin from his land and not from some other point so as to finally reach his land. Hence where his ownership is only to the bank or shore, the accretion must begin at that point." 65 C.J.S. 179, Navigable Waters, Sec. 82; *Hohl v. Iowa Cent. Ry.,* 162 Iowa 66, 143 N.W. 850 (1913); 56 Am. Jur. 899, Waters, Sec. 485.

Any alluvion deposited on the bed of Laguna Madre in the manner described by petitioners' principal witness, Dr. Fisk, is, under the above rule, an accretion to the bed and, as held by the Court of Appeals, belongs to the owner of that bed, the State of Texas. This was recognized in *City of Victoria v. Schott,* 29 S.W. 681, 682 (Tex. Civ. App. 1895), where the court said: "The islet, when formed, was an accretion to the soil in the bed of the stream, and the owner of such bed became the owner of the accretion." See *Maufrais v. State,* 142 Tex. 559, 571, 180 S.W. 2d 144, 150 (1944).

In *St. Louis v. Rutz,* 138 U.S. 226, 247 (1891), this Court said:

> ". . . It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon."

All of the evidence shows that the boundary of Laguna Madre is still clearly visible and well known, being demarked in this area by the shore of petitioners' mainland grants, which, with well-defined banks, still rises above the bed of Laguna Madre (R. 1838-1840, 1843, 177, 249, 1242; D. Ex. 23-28). This is shown also by the "Advance Print" of the United States Coast & Geodetic Survey map of the area submitted by petitioners, of which they seek to have this Court take judicial notice. The following statement in Coulson and Forbes, *The Law Relating to Waters* (4th ed. 1924) 37, is therefore particularly applicable here:

> ". . . The doctrine of accretion will never apply when the old line of demarcation between the land and water has always been in existence and still remains patent for all to see."

The above "Advance Print" submitted by petitioners, which, incidentally, states that it is "subject to correction after verification and review," in fact supports the evidence presented by respondent and the findings of the trial court as to the action of the water in this area. The following "Note" is found on this print:

> "Water stages in this area vary widely with meteorological conditions. The high-water line has been omitted where it is indefinite and is not marked by visible evidence on the ground. The

> broken line indicates the approximate inshore limits of areas subject to inundation. The dotted line represents the approximate low-water line."

The print shows that the entire area in controversy is subject to inundation by the high water and that the bed is covered by "sand and mud."

"Where water periodically rises over land and then recedes, there is no reliction." *Anderson v. Ray,* 37 S.D. 17, 22, 156 N.W. 591, 593 (1916); 56 Am. Jur. 892, Water, Sec. 476. There must be a "permanent uncovering of the land or laying bare of the bottom by permanent retirement of the waters." 65 C.J.S. 173, Navigable Waters, Sec. 81; *State v. Longyear Holding Co.,* 224 Minn. 451, 29 N.W. 2d 657 (1947); *Hillebrand v. Knapp,* 65 S.D. 414, 274 N.W. 821 (1937); *Sapp v. Frazier,* 51 La. Ann. 1718, 26 So. 378 (1899); *State v. Thompson,* 134 Iowa 25, 111 N.W. 328 (1907). There being no dispute that the prevailing winds cause the sea water to roll over the area in question many times throughout the year, the Court of Appeals correctly held that there has been no reliction.

The Court of Appeals concurred in the findings of the trial court that there has been no accretion or reliction to petitioners' mainland grants. (190 F. 2d at 199.) In the opinion denying the petition for rehearing, the Court said:

> "After an extended hearing of much oral and documentary evidence, the trial court found that the sea has not abandoned these lands; that whatever building up has taken place has been by depositions to the bed of the sea, by accretions to the islands (mainly if not entirely to Toro) by relictions from Padre Island, and not by accretions to

> the shore of the mainland, which is still plainly discernible. The lower court specifically found that: 'The line of demarcation between the Laguna and the Mainland is still patent for all to see. The area in controversy . . . is not fast land.' It also found that there has not been any substantial change or building up of the area since the original surveys, particularly since the survey by Lieutenant Meade in 1846. In the last analysis, our decision must rest upon these findings, as in our judgment they are not clearly erroneous. . . ." (191 F. 2d at 716.)

It is well settled that these concurrent findings of fact by the two courts below "will be accepted here without re-examination of the evidence." *Allen v. Trust Company of Georgia*, 326 U.S. 630 (1946); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Comstock v. Group of Investors*, 335 U.S. 211, 213-214 (1948).

II.

The opinion of the Court of Appeals does not conflict with the Balli case.

Petitioners assert that the opinion of the Court of Appeals conflicts with the decision in *State v. Balli*, 144 Tex. 195, 190 S.W. 2d 71 (1944), cert. den. 328 U.S. 852, saying that the Texas Supreme Court in that case "held that the Mexican grant conveying Padre Island to respondent's predecessors extended to the line of mean high tide because Laguna Madre was called for as the west boundary of the island." (Petition, p. 4.) That the alleged conflict does not exist is shown clearly by an examination of the facts and holding in the *Balli* case.

State v. Balli was a suit in trespass to try title brought by the State of Texas. The grant involved in that case was a Mexican grant of an island, confirmed by the Legislature as an island. The State in its petition described the island by field notes prepared by J. S. Boyles, which, as shown in the opinion of the Texas Court of Civil Appeals, were "based upon what Boyles considered the line of mean high tide." (173 S.W. 2d 522, 543.) No findings of fact were made by the trial court, which rendered judgment against the State. On appeal, the State for the first time sought to attack Boyles' location of the boundary of the grant along the line of mean high tide. The following extract from the opinion of the Supreme Court shows the basis of the Court's holding on that point:

> "There remains the question of the location of the boundary of the grant. The survey was based upon what the surveyor considered the line of mean high tide. The judgment of the lower courts was to the effect that the State had no interest in and to the lands enclosed by the survey. No survey was made of a line purporting to be the line of high winter tide. It is the contention of the State that the grant is limited by this line under the law in force in Tamaulipas at the time of the grant and that the State should have judgment for the land lying between the line of winter high tide and mean tide. The respondents contended in the Court of Civil Appeals, and make the same contention here, that the evidence is sufficient to support a finding that there is no substantial difference in fact between the line of high winter tide and the line actually surveyed by the surveyor Boyles. The Honorable Court of Civil Appeals reviewed the evidence and sustained the conten-

> tions of respondents. We are in accord with that view." (144 Tex. at 252, 190 S.W. 2d at 101.)

It is apparent from the above extract that the Texas Supreme Court in the *Balli* case did not, either expressly or otherwise, deny the proposition stated earlier in its opinion that the controlling law was "the civil law in effect at the time of the grant as it existed in the State of Tamaulipas," which the Court said was "the law as incorporated in Las Siete Partidas." (144 Tex. at 248, 190 S.W. 2d at 99.) The Court stated that under that law

> ". . . The seashore was defined to be 'all that ground is designated the shore of the sea which is covered with water of the latter during the whole year, whether in winter or summer.' " (144 Tex. at 251, 190 S.W. 2d at 100.)

The Court thus adopted White's translation of the Partidas, which is in accord with the official Gregorio Lopez edition (1555) and all other English translations except one.[1]

The Court of Appeals also recognized the controlling effect of the Spanish law in this case, saying:

> "Under the Spanish law, the seashore extends to the line of the highest tide in winter. Mayor, etc., of City of Galveston v. Menard, 23 Tex. 349, 399. In inland seas, at some places, the tides are nearly insensible. Precisely speaking, where there is no tide there is no shore; but, because a portion of the sea has no shore, it does not follow that it

[1] White's *New Recopilacion of the Laws of Spain and the Indies* (1839) 70 contains the following translation: "By shore of the sea we understand whatever part is covered with water, whether in winter or summer."

has no bed. The area in controversy was formerly the bed of the sea. The burden on the appellants was two-fold: first, to prove that the sea had abandoned this area; second, to prove that appellants had acquired it by accretion or reliction. According to the findings below, the appellants did not meet either burden." (191 F. 2d at 716.)

It is clear that there is no conflict between the decision of the Texas Supreme Court in the *Balli* case, which recognized that Padre Island "is bounded by . . . Laguna Madre on the west,[2] and the holding of the Court of Appeals in this case that petitioners' mainland grants are bounded by Laguna Madre on the east and do not include the area in question. This area has always been and is now a portion of the bed of Laguna Madre which is held in trust by the State of Texas for the benefit of all its people.

III.

The Court of Appeals correctly held that this is an equitable proceeding in which the parties were not entitled to a jury trial as a matter of right.

A jury was appointed in this case in an advisory capacity (R. 1882-1884), and evidence was presented for nearly three weeks before the court and jury. However, after counsel for petitioners and all other counsel agreed that there were no issues of fact to go to the jury, the jury was discharged (R. 1368-1395).

As shown in the opinion of the Court of Appeals on rehearing, petitioners did not there complain "of the discharge of the jury in itself, but of the court having made findings of fact after having decided the case on

[2]144 Tex. at 200, 190 S.W. 2d at 73.

the undisputed facts." (191 F. 2d at 714.) Petitioners urged the Court of Appeals "to decide the case on the merits if possible," stating that "the trial was lengthy, arduous, and expensive; that the case was fully developed by both sides; and that they should consider it most regrettable if the entire case should be sent back for another trial." (191 F. 2d at 714.) Petitioners do not ask this Court to send the case back for a retrial before a jury but contend that the findings of fact by the trial court should be disregarded.

In denying the petition for rehearing, the Court of Appeals discussed at length the nature of this suit and petitioners' right to a jury trial, concluding that this was an action to remove cloud or to quiet title "inherent in equity, and that the parties were not entitled to a jury trial as a matter of right." (191 F. 2d at 708.)

In seeking to show this is not an action in equity, petitioners assert that respondent was not in possession of the area and that petitioners were in possession of the area by reason of their possession of the mainland.

The allegations as to possession of the controverted area were discussed by the Court of Appeals as follows:

> "The plaintiff alleged in its complaint that, at the time of suit, it was in the actual possession of all of said land. The defendants denied that plaintiff was in possession of 'each of said tracts,' but admitted that plaintiff had a camp located on said land and had done some surveying thereon. Later, the answer denied that the plaintiff was actually in possession of any of said land except the small area surrounding said camp. The defendants did not allege that they were in possession of any of

> the controverted area, but only that it was accreted land, above mean high tide, on which they had mineral leases. Neither side alleged that the defendants were in possession of the land. . . ." (191 F. 2d at 708-709.)

The record shows that respondent "had such possession as the character of its leasehold interest entitled it to exercise."[3] (191 F. 2d at 712.) Even if there were some question about this, however, there can be no question about the fact that petitioners were not in fact in possession of this area. Therefore, respondent could not have brought an action in ejectment at common law. *Holland v. Challen,* 110 U.S. 15, 25 (1884). Since the right to jury trial exists "only if the relief sought were appropriate to ejectment,"[4] petitioners would not have been entitled to a jury even if the statutory trespass to try title action had been brought.

The Texas trespass to try title statute provides that

> "All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title."[5]

Insofar as this statute authorizes a suit at law by one in possession, it is a remedy "subsequently provided by statute and which did not previously exist" at common law, and thus is a case in which no constitutional right to jury trial exists in the federal courts.

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[3]R. 208-211, 214-272, 273-312; P. Exs. 12-50, 92-570, 591-611.

[4]3 Cyc. Fed. Proc. 490, Sec. 791.

[5]Laws of the Republic of Texas, 3rd Cong., 1st Sess. (1840), p. 136; 2 Gammel, Laws of Texas 310; codified as Article 7364, Vernon's Texas Civil Statutes.

Simmons v. United States, 29 F. Supp. 285, 286 (W. D. Ky. 1929). The right of trial by jury preserved under the Seventh Amendment "is the right which existed under the English common law when the Amendment was adopted." *Baltimore & C. Line v. Redman,* 295 U.S. 654, 657 (1935).

That the equity jurisdiction of the federal courts is not ousted by state legislation providing a remedy by an action at law has long been established. *McConihay v. Wright,* 121 U.S. 201 (1887); *Sheffield Furnace Co. v. Witherow,* 149 U.S. 574 (1893). As stated in *Smyth v. Ames,* 169 U.S. 466, 516 (1898):

> ". . . One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. *Case of Broderick's Will,* 21 Wall. 503, 520; *Holland v. Challen,* 110 U.S. 15, 24; *Dick v. Foraker,* 155 U.S. 404, 415; *Bardon v. Land & River Imp. Co.,* 157 U.S. 327, 330; *Rich v. Braxton,* 158 U.S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute —may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne v. Hook,* 7 Wall. 425, 430; *McConihay v. Wright,* 121 U.S. 201, 205."

Respondent prayed for a removal of the clouds cast

upon its title by petitioners and for an injunction restraining petitioners from interfering with respondent's enjoyment of its rights to the property (R. 76-77). Suits to remove cloud or to quiet title have always been the subject of equity jurisdiction, and "may be resorted to under proper circumstances even where the legal title is involved, and although it may not have been previously established at law." *Wilmore Coal Co. v. Brown,* 147 Fed. 931, 946 (W. D. Pa. 1906), aff. 153 Fed. 143, cert. den. 209 U.S. 546; 51 C.J. 148, Quieting Title, Sec. 22.

The latest pronouncement by this Court of the rule that there is no right to jury trial in "an equity action for an injunction" is found in *United States v. Louisiana,* 339 U.S. 699, 706 (1950). For a collection of the cases on this question, see the annotation in 117 A.L.R. 9, 12 (1938), where it is said that

> ". . . the mere fact that in deciding as to whether equitable relief shall be granted a court must dispose of issues of legal title or right is not generally regarded as rendering the suit one at law wherein a jury trial may be had as of right, the character of the appropriate relief and the inadequacy, or nonexistence, of legal remedy being sufficient as a foundation of equity jurisdiction."

Therefore, petitioners' contention that they were wrongfully deprived of a trial by jury is wholly without merit.

CONCLUSION

For the foregoing reasons it is respectfully sub-

mitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

JESSE P. LUTON, JR.
Assistant Attorney General

BEN H. RICE, III
Of Counsel

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